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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-539

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN and
PHILLIP BRINKMAN,
By Their Mother and Next Friend, Donna Brinkman, et al.,

(Additional Respondents Inside Cover)

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Additional Respondents:

Jesse Montague, Jr. and Debbora Montague,
by their Mother and Next Friend, Arva Montague;

Debbora Mitchell,
by her Father and Next Friend, John Mitchell;

Robbin J. Kent, Michael J. Kent and Leslie A. Kent,
by their Father and Next Friend Henry K. Kent;

Claudius R. Walker, Frserieea M. Walker and Bernice L.
Walker, by their Father and Next Friend, C. R. Walker, Jr.;

Rubin Atitia Jackson and Lahmarie Jackson,
by their Mother and Next Friend, Winona Jackson;

National Association for the Advancement of Colored People;

John J. Gilligan, Governor of the State of Ohio, etc.;

William J. Brown,
Attorney General of the State of Ohio;

Ohio State Board of Education;

Martin W. Essex, Superintendent of Public Instruction,
Ohio Department of Education;

Terry Lawson;

Leo A. Lucas;

Jane Sterzer;

Wayne M. Carle,
Superintendent of Dayton School District.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Dayton Board of Education, two individual Board members, William E. Goodwin and Josephine Groff, and a former Board member, James D. Hart, pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Sixth Circuit entered on July 26, 1976, June 24, 1975 and August 20, 1974.

I. OPINIONS BELOW

The July 26, 1976 opinion of the Court of Appeals, not yet reported, appears in the appendix to this petition. The opinions of the Court of Appeals issued on June 24, 1975 and August 20, 1974 are reported at 518 F.2d 853 (6th Cir.) and 503 F.2d 684 (6th Cir.). Both of these decisions and the unreported opinions of the District Court also appear in the appendix attached hereto.

II. JURISDICTION

The judgments of the Court of Appeals for the Sixth Circuit were made and entered on July 26, 1976, June 24, 1975 and August 20, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED

A. Does The Imposition Of A District Wide Racial Balance Remedy Exceed The Remedial And Equitable Powers Of A Federal Court And Does Such Imposition Violate 28 U.S.C. § 1712, Where, Although Isolated Segregative Practices Have Been Found To Exist, It Has Been Affirmatively Determined That The Board Of Education Has At No Time Maintained A Dual System?

B. Is A Judicial Decree Valid Which Requires A Fixed Racial Balance For Each And Every School In The System?

C. Is A Judicial Decree Valid Where The Complainants Have Failed To Establish That Any Injury To Them Has Occurred And That The Action Is Maintainable As A Class Action?

D. Is A Desegregation Remedy That Will Result In Resegregation Constitutionally Mandated?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fourteenth Amendment To the United States Constitution, Section 1:

". . . nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the law."

B. United States Code, Title 20:

§ 1712. Formulating remedies; applicability

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek to impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

§ 1751. Prohibition against assignment or transportation of students to overcome racial imbalance

No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

§ 1754. Provisions respecting transportation of pupils to achieve racial balance and judicial power to insure compliance with constitutional standards applicable to the entire United States

The proviso of section 2000c-6(a) of Title 42 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV, under all circum-

stances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

C. United States Code, Title 28:

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

D. United States Code, Title 42:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to

make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

E. Ohio Revised Code, Chapter 33:

§ 3313.48. Free Education To Be Provided; Minimum School Year.

The Board of Education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof.

V. STATEMENT OF THE CASE

The complaint commencing this school desegregation action was filed in the United States Court for the Southern District of Ohio, Eastern Division, on April 17, 1972 by parents acting on their own behalf and on behalf of their minor children who attended schools in the Dayton Public School District and the National Association for the Advancement of Colored People (all of whom are hereinafter referred to as adverse respondents). Named as defendants to the complaint were

the Governor of Ohio, the Attorney General of Ohio, the State Board of Education, the Superintendent of Ohio Department of Education, six individual members of the Dayton Board of Education and the Superintendent of the Dayton School District.

A trial on the single issue of whether the school system of Dayton was a segregated one by reason of acts of the Dayton Board of Education commenced on November 13, 1972. Equity jurisdiction of the District Court was predicated upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and upon "28 U.S.C. §§ 1981 and 1983 and 42 U.S.C. § 1343" (App. 1a).

None of the adverse respondents testified at the trial and none of the evidentiary exhibits established that any of the named adverse respondents was ever excluded from attending any school in the Dayton system or that any was a member of a class that was allegedly excluded. Likewise, there was no evidence that any of the adverse respondents was a school child or a parent of a school child or that any of them ever attended or sought to attend a school within the Dayton district.

On February 7, 1973 the Trial Court rendered an opinion in which it found that racially imbalanced schools, optional attendance zones and recent Board action in rescinding three resolutions calling for racial and economic balance in each school in the Dayton system constituted a cumulative violation of the Equal Protection Clause, and that the rescission action constituted an independent constitutional violation (App. 11a, 12a). While school practices in the area of staff assignment,[1]

[1] By 1969 the Dayton Board proportionately employed more black teachers and administrators than any of the twenty largest school districts in Ohio (Defendant Board of Education Ex. AQ) and since the fall of 1971 faculty in the Dayton system have been assigned in such a manner that the ratio between the black and white teachers in each school substantially reflects the ratio between the black and white teachers in the system as a whole (Defendant Board of Education, Ex. AN).

establishment of attendance zones, school construction and site selection, grade structure and reorganization, student transfers and transportation were alleged to have constituted the establishment of a dual system, these practices were passed upon by the District Judge and were found free from any segregative intent or effect (App. 5a-10a).

In order to correct the constitutional violations, the District Court ordered the Dayton Board to submit a plan which would (1) abolish all optional zones, (2) restate the priorities of the freedom of enrollment program so that racial transfers would take precedence over curriculum transfers, (3) maintain the faculty assignment practices so that the faculty in each school would continue to reflect the approximate racial balance of the total black-to-white faculty in the Dayton system, and (4) establish hiring practices which would enable the clerical and maintenance personnel hired by the Dayton system to approximate the proportion of the black-to-white population within the Dayton system.

In compliance with the February 7, 1973 order of the District Court, the Dayton Board submitted its plan to the Trial Court. This plan contained eleven points:

(1) Elimination of all elementary and high school optional areas;

(2) Revision of the Freedom of Enrollment Program whereby racial balance took priority over other permissible transfers;

(3) Declaration that faculty assignment to each school would continue to reflect a racial composition that would approximate a ratio of black-to-white faculty in the entire district;

(4) Modification of hiring policies for classified personnel;

(5) Establishment of four city-wide elementary science centers the enrollment of which would approximate the existing black-white ratio of students in the system;

(6) Combination of two high schools into a unified co-operative school with district-wide attendance areas;

(7) Formation of elementary and high school all-city bands, orchestras and choruses;

(8) Provisions for scheduling of integrated athletics;

(9) Establishment of a minority language program for education of staff;

(10) Utilization of the Living Arts Center for inter-racial experiences in art, creative writing, dance and drama;

(11) Creation of centers for rumor control, school guidance and area learning.

After submission of the Board plan and after publication of *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973), the District Judge entered a supplemental order on remedy (App. 26a-31a). In this July 13, 1973 opinion the Trial Court stated that there was no "evidence of a failure of the equality of facilities, instructors and curricula opportunities . . ." (*Id.* at 30a). The Trial Court adopted the Board plan with the modification that any student could attend any high school of his or her choice within the Dayton system.

An appeal from the constitutional violations and remedy judgment of the District Court was filed by the adverse respondents, and the Dayton Board cross-appealed. On August 20, 1974 the United States Court of Appeals for the Sixth Circuit affirmed the finding of three cumulative constitutional violations. *Brinkman* v. *Gilligan*, 503 F.2d 684, 693 (6th Cir. 1974); App. 32a-69a.

The Court of Appeals did not, however, pass upon the question of whether the rescission action constituted an independent constitutional violation. Rather, the appellate court stated that "[t]he question of whether a rescission of previous Board action is in and of itself a violation of the appellants' constitutional rights is inextricably bound up with the question

of whether the Board is under a constitutional duty to take the action which it initially took." Continuing, the Court of Appeals held that "[i]f the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board is under such a duty, then the rescission becomes part of the cumulative violation, and it is not necessary to ascertain whether the rescission ipso facto is an independent violation of the Constitution" (*Id.* at 696; App. 55a).

On the remedy issue raised in the appeal, the Sixth Circuit concluded that the remedy prescribed by the District Court was inadequate in light of its view of the nature of the violations. Accordingly, the action was remanded to the Trial Court for formulation of another desegregation plan consistent with the remedial guidelines of *Keyes* and *Swann* (*Id.* at 704; App. 69a).

After the first appellate remand the District Court ordered the Board and any other interested party to submit desegregation plans. Under the plan submitted by the adverse respondents each and every school in the Dayton system would have become racially balanced; that is, the black-white student ratio in each school would approximate within a plus or minus fifteen percent the black-white ratio of the entire district (App. 77a-78a). The plan submitted by the Dayton Board contained the following key elements:

(1) The closing of the all black Roosevelt High School with the students who would have attended this school being given priority under open enrollment to attend any high school;

(2) Creation of a downtown magnet high school and satellite magnets at the predominantly black schools of Dunbar and Roth with enrollments in the specialized courses offered at these magnets open to students throughout the district;

(3) Creation of magnet learning centers for foreign languages, business education and career motivation for sixth through eighth grade students;

(4) Establishment of a new vocational high school where student enrollment would be racially balanced;

(5) Expansion of the science learning centers to accommodate additional middle school students (participants in this successful, mandatory program would attend racially balanced classes for approximately ten percent of their time);

(6) Establishment of a structured, alternative elementary school at the predominantly black Miami Chapel School where enrollment would reflect the approximate racial balance of the system for those students who attended this elective full time school.

After a hearing on the plans, the District Court rejected the plan of the adverse respondents; found that racial balance in each and every school in the district was not required under *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); and concluded that the racial balance plan of the adverse respondents was violative of the Equal Educational Opportunities Act of 1974 (App. 79a). In provisionally accepting the plan of the Dayton Board for the 1975-76 school year, the Trial Court held that the plan of the Board was desegregative in intent and integrative in effect (*Id.* at 80a, 83a).

In this order of March 10, 1975 the District Judge additionally held that (1) the State of Ohio has not since 1887 mandated a dual system (*Id.* at 75a); (2) although the Dayton Board has engaged in activities that were segregative in effect and which impinged upon the constitutional rights of the plaintiffs, the Board *did not at any time maintain a dual system of education* (*Id.* at 75a, 77a); and (3) *there were no district-wide segregative acts* (*Cf.* App. 77a and n.7 thereon).

The March 10, 1975 order accepting the Board plan was again appealed by the adverse respondents to the Sixth Circuit Court of Appeals. A motion of the adverse respondents for summary reversal was deferred pending a stepped-up time

for submission of briefs and argument. While declining to grant summary reversal because of the time factor between the rendition of the opinion and the opening of school in the fall of 1975, the Court of Appeals remanded the action to the District Court with the direction that "the Court adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this Court and with the decisions of the Supreme Court in *Keyes* and *Swann*" (App. 96a).

In the second appellate opinion, rendered on June 24, 1975 the Court of Appeals held that the Board plan was inadequate since "the basic pattern of one-race schools would continue largely unabated" and "the vast majority of one-race schools will remain identifiably as such" (*Id.* at 93a). Additionally, the Court of Appeals held that the Equal Educational Opportunities Act of 1974 did not limit the scope of the remedy for the constitutional violations found to exist (*Id.* at 95a).

After the second remand order the Trial Court appointed Dr. Charles Glatt as an expert witness for the purpose of preparing a desegregation plan. Due to the unfortunate death of Dr. Glatt the District Court on November 5, 1976 appointed Dr. John A. Finger, Jr. as a court consultant and ordered the Dayton Board and other interested parties to submit desegregation plans on or before December 1, 1975.

During this same time, a petition for a writ of certiorari was filed with this Court. The adverse respondents objected to the entertainment of the writ on the grounds that the appellate order of June 24, 1975 was interlocutory and was a remand order requiring further substantive proceedings. *See, Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916). Thereafter, the writ was denied. *Dayton Board of Education* v. *Brinkman*, 423 U.S. 1000 (1975).

On December 8, 1975 hearings were held upon the plan submitted by the adverse respondents and the plan transmitted to the Court by the defendant Board. After consider-

ing these plans the Trial Court on December 29, 1975 decreed that the Dayton Board could adopt any plan provided that as of September 1, 1976 each school in the Dayton system was desegregated. Desegregated was defined so as to require each school in the system (excepting grades eleven and twelve for the academic years of 1976 through 1978) to have a pupil population that reflected, within plus or minus 15%, the racial composition of the district as a whole (App. 103a). Dr. Finger was appointed as a Master to supervise these student assignments and was directed to submit an assignment report.

The Master filed his report on March 15, 1976 and a hearing was held on this report on March 22nd and March 23rd. At the conclusion of the hearing the Trial Court adopted the Master's racial balance assignment plan for the elementary level and rejected the phase-in proposal of the defendant Dayton Board. At the high school level, the Court permitted the Board to choose between the Master's student selection plus random assignment or the Board's proposal for specific attendance districts with the proviso that the racial balance requirement be met.

On May 14, 1976 the District Court granted a modification of the Master's report which did not affect the racial balance requirement. At the same time, the Court rejected a request seeking permission to exclude most of next year's eighth graders from the racial assignment requirement.

An appeal from the December 29, 1975 and March 25, 1976 judgments (App. 107a, 114a) was prosecuted by the Dayton Board. The request of the Board for a stay pending appeal was denied but the entire appellate time table was stepped up. On July 26, 1976 the Sixth Circuit affirmed the judgments of the Trial Court which ordered a district-wide racial balance distribution of students in each school in the Dayton system (App. 118a-123a).

Although racial imbalance existed in the schools comprising the Dayton district, the student population of each school was consistent with the black-white geographical distribution of the Dayton area (App. 5a). All sixty-eight schools of the

Dayton system – fifty-two elementary, five middle and eleven high schools, with the exception of the city-wide co-operative high school – were uniformly and impartially located in areas where students or potential students were concentrated (R. 1783).

In compliance with section 3313.48 of the Ohio Revised Code attendance zones for each school, excepting the co-operative high school, were drawn so as to make access from home to school as convenient as possible for the greatest number of students (R. 1560). These zones were not irregular in shape, were not gerrymandered and had remained essentially stable over the past twenty years notwithstanding changes in the student composition whereby many of the schools changed from predominantly white to predominantly black (R. 1590). In 1969 the assignment patterns were modified by enactment of a Freedom of Enrollment policy which permitted student transfers for the purpose of racial balance (R. 1334-35). The effect of this program was reflected in the fact that as of the beginning of the 1972-73 school year, no all-white schools existed within the Dayton system (Board of Education, Ex. AS).

Numerous optional areas were created in the Dayton system in the 1950's and the early 1960's. These optional areas, which permitted a student residing in a designated zone to attend one of two schools, were scattered throughout the system (R. 1629) and were located so as to be equidistant from the two schools that they served (R. 1606). Standards of access, safety, school capacity, convenience and prior patterns of attendance were the criteria governing the establishment of optional zones.

While the District Court found that the convenience concept may have embraced desires motivated by racial consideration in possibly three optional areas, it specifically held that the "majority of the optional zones had no racial significance at the time of their creation" and that "none of the elementary school optional zones today have had significant potential effects in terms of increased racial separation" (App.

8a). Moreover, those optional zones which were found to be in violation of constitutional rights did not involve a substantial or significant segment of the school system. This position is substantiated by the holding of the Trial Court that at no time has the Dayton Board maintained a dual system (App. 75a).

On December 8, 1971 a lame duck Board of Education, whose majority had lost the November, 1971 election, passed three resolutions. One of these resolutions required the elimination of all attendance zones with concomitant transportation of students for purposes of achieving a racial and economic balance of students within each school in the Dayton system. After several parliamentary maneuvers, the new Board majority on January 3, 1972 took action which in the opinion of the District Court constituted a rescission of the three resolutions (App. 11a).

While the rescission action was held by the District Court to have constituted an independent constitutional violation, the Sixth Circuit held simply that the rescission was part of the cumulative violation since rescission alone could not constitute a violation of the Constitution unless there was a constitutional duty to take the action that was rescinded. *Brinkman* v. *Gilligan*, 503 F.2d 684, 704 (6th Cir. 1974).

It is apparent that the finding with respect to optional zones is the keystone of the cumulative violation which the Court found to exist. Without this finding, neither of the other two findings comprising the cumulative violation would have constitutional significance. In the absence of a constitutional duty, the school board was as free to rescind the December resolutions as it was to adopt them. The third finding – a condition of racial imbalance in schools as a result of the geographic distribution of races in the school system – would be constitutionally innocuous in and of itself. *Lawlor* v. *Board of Education of City of Chicago*, 458 F.2d 660 (7th Cir. 1972); *Bradley* v. *School Board of City of Richmond*, 462 F.2d 1058, 1069 (4th Cir. 1972), *aff'd*, equally divided court, 412 U.S. 92 (1973); *Spencer* v. *Kugler*, 326 F.Supp. 1235 (D.N.J. 1971), *aff'd*, 404 U.S. 1027 (1972); *Deal* v. *Cincinnati Board of Education*, 419 F.2d 1387 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971). Yet, the predicate for the Sixth Circuit's affirmance of the racial balance plan was the existence of identifiable one-race schools (App. 93a).

VI. REASONS FOR GRANTING THE WRIT

The judgments of the Trial Court and of the Sixth Circuit Court of Appeals affirming the racial balance orders should be reviewed because they (1) erroneously require a remedy which is in conflict with the prohibitions and considerations contained in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973) and 28 U.S.C. § 1712; (2) permit judicial intervention in absence of any showing of injury to the complainants contrary to the legal precedents contained in prior decisions of this Court; and (3) impose a remedy which will lead to resegregation of the Dayton school system rather than a unitary system.

Should this Court fail to grant certiorari in this case and resolve the issues presented, the Sixth Circuit will have established precedents that will have a devastating effect on future cases in the school desegregation area. The Sixth Circuit has espoused a "land mine" theory of desegregation by mandating a racial balance remedy where the unreversed finding of the District Court is that the Dayton Board never maintained a dual system of education (App. 75a) and where the finding of facts on the issue of unconstitutional action is in favor of the Board in all but the limited area of optional zones (App. 5a-12a), the majority of which had no racial significance at the time of their creation (App. 8a). It has in effect abandoned any relationship between nature of violation and scope of remedy. Whenever a school board permits an isolated segregative act or series of acts, it triggers off a system-

wide remedy of eliminating racially identifiability by balancing the races in each school in the system.[2] Such a holding abandons prior decisions of this Court and creates a confusion in the law that cannot be permitted to exist. Further, in future desegregation suits standing and the right of a party to institute an equitable action will be established by merely alleging in a pleading that the complainant is a parent of or a student in an alleged segregated school system.

By erroneously equating desegregation with elimination of any predominantly white or predominantly black schools throughout the system, the Sixth Circuit has closed its eyes to desegregative devices that carry positive integrative force. The available choice of remedy is limited to a system-wide approach of moving students to achieve a racial balance that will lead inexorably to a resegregation of the school system. As the testimony presented to the District Court indicated and as experience throughout the country has confirmed, forced transportation to achieve racial balance will serve only to drive whites and middle class blacks out of the school system. The result of such action would transmute a constitutional promise of equal educational opportunity into the ashes of an impoverished school system serving a low economic predominantly black student population. Can this Court sit idly by and permit the achievement of such a result in the name of the Constitution?

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[2] The Sixth Circuit continues to follow the assumption that schools cannot be truly desegregated unless the racial composition of the student body in each school substantially reflects the racial composition of students in the system as a whole despite the Supreme Court's determination that the Sixth Circuit was in error in making that assumption in *Milliken* v. *Bradley*, 418 U.S. 717 (1974). Proof of this is found in the second Sixth Circuit opinion where, notwithstanding the affirmance of the limited constitutional violation, the appellate court rejected the approved plan because of the continued existence of racially identifiable one-race schools (App. 93a).

A. THE RACIAL BALANCE DECISIONS CONFLICT WITH THE DECISIONS OF THIS COURT RENDERED IN SWANN, MILLIKEN AND KEYES.

The first two questions presented by this petition involve two departures by the lower courts from the legal and equitable principles established by this Court. If the principles enunciated in *Swann*, *Milliken* and *Keyes* continue to have vitality, then this litigation is ripe for review. Otherwise, irrespective of the nature of the violation, a federal court will be totally unrestrained in the exercise of its remedial powers.

1. The Scope Of The Remedy Is Limited By The Nature Of The Constitutional Violation.

In fashioning desegregation decrees, equitable principles control. *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955). The "task is to correct, by balancing of the individual collective interests, the condition that offends the constitution." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), *Millilken* v. *Bradley*, 418 U.S. 717, 738 (1974). A remedial desegregation power exercised by a federal court can only be invoked on the basis of a constitutional violation and the scope of the remedy cannot exceed the nature of the violation. *Ibid.* Before any affirmative duty arises to dismantle and to eliminate the identifiability of one race schools, there must be a finding of a dual system mandated by state statute or a dual system predicated upon evidence establishing state imposed segregation in a substantial portion of the school district. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 200, 203, 208-209 (1973).

The unreversed findings of the District Court are that the Dayton system did not at any time "maintain a dual system of education" (App. 75a, 77a). This holding of a non-dual system not only includes the finding that the Dayton district was not operating a mandated dual system as proscribed in

Brown v. *Board of Education*, 347 U.S. 483 (1954), but also that the cumulative constitutional violations did not constitute state imposed segregation in a substantial or significant portion of the district as proscribed in *Keyes*. Significantly, at the time the District Court issued its finding that the Dayton system was not a dual one, it had the benefit of the *Keyes* decision. Recognizing that a dual system could exist not only in a system which mandated racial segregation by state law but also in a system where there was "proof of state imposed segregation in a substantial portion of the district" (*Keyes*, *supra* at 203), the District Court made specific mention of the non-existence of a statutory mandated dual system and then went on to state, not just once but on two separate occasions, that the Dayton Board did not maintain a dual system of education (App. 75a, 77a).

While the adverse respondents continually refer to evidence which allegedly supports other unconstitutional violations and which they contend requires a root and branch remedy, the District Court carefully reviewed all of the evidence relating to those alleged violations and found nothing that offends the constitution (App. 3a-12a). On each of the three appeals the adverse respondents have begged the Sixth Circuit to reconsider the failure of the District Court to include the other allegedly unconstitutional acts as part of the cumulative violations but on each occasion the appellate court has refused to do so. Thus, the only unconstitutional action chargeable to the Board was the establishment and maintenance of four optional attendance zones which affected a few but certainly not a substantial portion of the students in the Dayton system. The remaining cumulative violations, rescission of the three resolutions and the existence of racial imbalance, have no independent constitutional significance. (See pages 14-15, *supra*).

In ordering a district-wide, racial balance remedy, originally found unnecessarily by the Trial Court (App. 75a-79a), the lower courts have created a "land mine" theory of desegregation. They have abandoned any relationship between nature

of violation and type of remedy. Notwithstanding the non-existence of a dual system, any segregative act or series of acts triggers off a system-wide remedy of eliminating racial identifiability by balancing the races in each school in the system. In essence, once a constitutional violation has been found, the greatest possible degree of desegregation is required regardless of the nature of the violation. Such a holding which results in imposition of a system-wide remedy and the rejection of plans which remedied isolated and individual *de jure* segregative practices (App. 75a, 77a, 90a) abandons and conflicts with the decisions of this Court in *Swann*, *Milliken* and *Keyes*.

In view of the findings establishing that the Dayton Board was not operating a dual system, the imposition of a system-wide racial balance remedy is further impermissible because it violates the Equal Education Opportunities Act of 1974; 20 U.S.C. §§ 1712, 1751, 1754. Under section 1712, a court can impose only those remedies which are essential to correct the constitutional violations. Sections 1751 and 1754 prohibit a court from ordering transportation for the purposes of racial balance. As a racial balance plan requiring transportation for purposes other than eliminating constitutional violations, the remedy imposed in this case is contrary to and violative of the congressional prohibitions contained in the Equal Education Opportunities Act of 1974.

2. The Remedy Requires A Patricular Degree Of Racial Balance As A Substantive Constitutional Right.

In its December 29, 1975 order and judgment the District Court required that the plan adopted by the Dayton Board desegregate the schools as of September 1, 1976 (App. 99a, 103a, 107a). The District Court stated that the system would be deemed desegregated as long as the schools of the Dayton School District each reflect, within plus or minus 15%,

the black-white ratio of the entire district (48% black – 52% white) (*Ibid.*).

Although the Court of Appeals stated that the mathematical formula was a flexible starting point, this finding was erroneous. *Cf. Bradley* v. *Milliken*, 411 F.Supp. 943 (E.D. Mich. 1975) where the same formula was rejected because of its adherence to fixed racial ratios. The exclusion of the junior and senior classes is applicable only for the present classes and will have no effect on flexibility hereafter. The permitted deviations from the proposal of the Master likewise do not demonstrate flexibility since any permissible modification cannot deviate from the plus or minus 15% requirement (App. 112a, 115a).

The inflexibility and rigidity of the racial balance requirement is not only demonstrated by the actual achievement of the objective but also is implicit from the following actions, statements and rulings of the District Court:

1. Approving the rejection by the Master of the Court guidelines for time and distance (R. 201-03);

2. Barring any deviations from the racial percentage on a school-by-school basis for geographic reasons; (the projected elementary assignments fall within plus or minus 7% of the black-white ratio of the entire district and, excepting present juniors and seniors, the high school assignments fall within the required racial percentage);

3. Considering the plan transmitted by the Board solely in the context of racially balancing the district as a whole (App. 101a);

4. In granting students a constitutional right to share equally all facilities of a school system holding that the "only feasible method of sharing requires a balancing in each school between black and white students in a ratio approximating the system-wide balance" (App. 102a);

5. Defining a desegregated school as one which has a black-white mix that reflects, within plus or minus 15%, the district ratio (App. 103a, 109a);

6. Ruling that as of September 1, 1976 each school in the Dayton system must have a pupil population that deviates no more than plus or minus 15% from the racial ratio of the district (App. 103a);

7. Adopting the Master's elementary pairing plan which assigns students on the basis of the racial balance requirement (App. 110a, R. 202-03) and rejecting the Board's suggestion of a phase-in for eight schools (App. 113a; R. 217-25);

8. Accepting the Master's rejection of the assignment guidelines contained in the Court order of December 29, 1975;

9. Holding that only schools which are properly racially balanced are acceptable for purposes of a desegregation remedy (App. 103a, 105-106a);

10. Reaffirming in its order of March 23, 1976 that student assignment for high schools (excepting juniors and seniors) and for elementary schools must be in compliance with the plus or minus racial balance requirement set forth in the order of December 29, 1975 (App. 111a).

The District Court has erroneously used the term "desegregated" synonymously with the term "racial balance" and has required a particular degree of racial mixing. The racial balance requirement is not just a starting point but is an inflexible test for determining whether each and every school has been desegregated. (See R. 123, 126-27 wherein the District Court stated that the composition of the schools would determine whether the system was desegregated.) This racial balance approach is contrary to *Swann* and is not required by the United States Constitution. *Carr* v. *Montgomery County Board of Education*, 377 F.Supp. 1123, 1133 (M.D. Ala. 1974), *aff'd* 511 F.2d 1374 (5th Cir.), *cert. denied*, 423 U.S. 986 (1975).

B. JUDICIAL INTERVENTION IN AN ACTION WHERE THE COMPLAINANTS HAVE FAILED TO ESTABLISH THAT ANY INJURY TO THEM HAS OCCURRED AND THAT THE ACTION IS MAINTAINABLE AS A CLASS ACTION IS CONTRARY TO JUDICIAL PRECEDENT.

The complaint of the adverse respondents alleged that the individual adverse respondents were children or parents of children attending schools in the Dayton system and that the parent adverse respondents were bringing the action on their own behalf, on behalf of their minor children and on behalf of other children similarly situated. The adverse respondent N.A.A.C.P. joined in the action on behalf of its members who were allegedly members of the class. The allegations of capacity and class representation were denied in the answer filed by the Dayton Board (R. A23a). Additionally, in the pretrial order and in the motion made at the close of the case of the adverse respondents, the Dayton Board again raised the issues of whether they were members of the class they purportedly represented and whether this action was properly maintainable as a class action (R. A49a, A2151a).

1. The Record Is Void Of Any Evidence That Any Of The Adverse Respondents Sustained Any Injury Or Was Deprived Of Any Constitutional Right.

The record conclusively demonstrates that the individual adverse respondents failed to establish that any one of them has sustained any injury or that any one of them was deprived of any right guaranteed him by the Constitution of the United States or any other legislative enactment. Although the District Court predicated jurisdiction under the Equal Protection Clause of the Fourteenth Amendment and under 42 U.S.C., sections 1981 and 1983 and 28 U.S.C., section 1343,

the adverse respondents cannot prevail on the merits in the absence of proof of a violation of their rights under these provisions. *Cf. Bell* v. *Hood*, 327 U.S. 678 (1946).

In a school desegregation case it is incumbent upon the adverse respondents to establish that they, or at least some member of the N.A.A.C.P., were excluded from a school in the Dayton system on account of race. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971). None of the adverse respondents ever testified at the trial of this action, and none of the evidentiary exhibits established that any one of them was ever excluded from attending any school in the Dayton system. Besides failing to establish the minimal requirement of injury or deprivation of any right, the adverse respondents failed to establish that any one of them was a school child or a parent of a school child or that any of them ever attended or sought to attend a school in the Dayton system. In the absence of proof of injury and deprivation of any constitutional right the adverse respondents cannot prevail in this equity action. *O'Shea* v. *Littleton*, 414 U.S. 488, 493-94 (1974); *McCabe* v. *A.T. & S.F. Railway Co.*, 235 U.S. 151, 162 (1914).

2. The Record Is Void Of Any Evidence That Any Of The Adverse Respondents Were Members Of The Class They Purportedly Represented And There Was No Determination That This Action Was Maintainable As A Class Action.

The propriety of this action as a class action under Rule 23 of the Federal Rules of Civil Procedure is dependent (1) upon the individual adverse respondents establishing that they are members of the class they purportedly represent, *Bailey* v. *Patterson*, 369 U.S. 31 (1962) and (2) certification by the District Court of this suit as a class action. *Pasadena City Board of Education* v. *Spangler*, ___ U.S. ___, 49 L. Ed. 2d 599 (1976). Neither of these requirements was met.

The record in this case is completely devoid of any testimony whatsoever that any of the individual adverse respondents, including any members of the N.A.A.C.P., were parents of children or children who are or were or would be attending any school within the Dayton school system or that any of them resided within the geographic boundaries of the Dayton school system. There is no evidence that any of the adverse respondents are members of the class that was allegedly, directly or indirectly, excluded from any school in the Dayton system because of their race. In the absence of such proof this action cannot be maintained as a class action. *Davis* v. *Schultz*, 453 F.2d 497 (3rd Cir. 1971); *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

Besides failing to establish that any of the adverse respondents was a member of the class they purportedly represented, there was no determination by the District Court that this action was maintainable as a class action. This failure, in and of itself, defeats the right of the adverse respondents to maintain this action as a class action.

C. IMPOSITION OF A REMEDY WHICH WILL LEAD TO RESEGREGATION RATHER THAN TO A UNITARY SYSTEM IS CONTRARY TO SWANN AND IS NOT CONSTITUTIONALLY MANDATED.

In addition to ordering a remedy which exceeds the nature of the violation, the lower courts have abandoned the equitable holdings in *Swann* which require a "balancing of the individual and collective interests" and the taking of necessary steps to convert the school system to a "unitary system". *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971).

The evidence presented at the hearings establishes that as a result of the demographic situation existing in the Dayton

district any effort to achieve racial balance in each school in the system requires pairing and clustering of schools (R. 196) with concomitant busing of approximately 15,000 students. The testimony of the plaintiffs' own witness was that these desegregation devices have not worked in the past and eventually result in a poor city with a poor school system (R. 118-20). Injunctive relief in such cases cannot extend to parents of school children, and for a variety of reasons a forced busing plan can be expected to drive white and upper middle class blacks out of the system, leaving behind a low economic, predominantly black student population. In fact the record establishes that 11,000 white and 900 black students have left the Dayton system in the last five years (R. 129).

Certainly a remedy which defeats the goal of providing an equal education opportunity for minority students and which will lead to resegregation of the city's schools is not constitutionally mandated. Indeed, an ironic and sad situation is presented when in the name of the Constitution, the rights and the opportunities which the Constitution was designed to protect are destroyed. The action of a federal court in imposing a plan that would inevitably lead to resegregation of the school system is no less a segregative practice that those unconstitutional practices which initially required federal intervention. Accordingly, any system-wide plan that will result in resegregation and a non-unitary system must be rejected.

VII. CONCLUSION

The racial balance order decreed by the District Court and affirmed by the Court of Appeals is in conflict with the equitable principles set forth by this Court in *Swann*, *Milliken* and *Keyes* and conflicts with 20 U.S.C. sections 1712, 1751 and 1754. The conflict with *Swann* and *Milliken* arises from (1) the imposition of a remedy which exceeds the scope of the constitutional violations and (2) the arbitrary fixation of a racial balance formula that must be strictly followed in order

that the yoke of racial segregation might be lifted from the shoulders of the Dayton Board. The conflict with *Keyes* stems from the imposition of a root and branch remedy to arrive at a racially nondiscriminatory system where it has been affirmatively determined that the school system has at no time maintained a dual system.

The racial balance plan imposed upon the Dayton Board embodies a misguided idealism that confuses the ultimate end with the immediate means. The evidence demonstrates that the inexorable effect of the apparent desegregation the mandated plan will produce is resegregation as a result of shifting population groups.

The issues presented by this petition – appropriate scope of remedy, establishment of fixed racial balances, standing and dangers of resegregation from ill-advised decrees – are critical issues not only in this case but in similar cases across the country. It is inevitable that this Court will pass on these issues, and we respectfully submit that the constitutional demands for orderly development of the law of desegregation and the social demands for guidance in this troubling area dictate that this Court's task of addressing the issues presented not be deferred. A writ of certiorari should be granted.

Respectfully submitted,

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A. FEBRUARY 7, 1973 FINDINGS OF FACT

(Filed February 7, 1973)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

FINDINGS OF FACT AND MEMORANDUM OPINION OF LAW

This is a school desegregation suit brought as a class action by the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education. This Court has proper equity jurisdiction under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; see *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954); 349 U.S. 294,, 300-301 (1955), and under 28 U.S.C.A. §§ 1981 and 1983, 42 U.S.C.A. § 1343.

This matter is before the Court upon the briefs, stipulations and exhibits presented by the respective parties; and upon the record adduced during expedited hearing conducted by

Court from November 13 through December 1, 1972. The limited question before the Court at said hearing was whether acts by the defendant Dayton School Board have created segregated educational facilities in violation of the Equal Protection Clause.

Having carefully examined the evidence presented, the Court, pursuant to Rule 52(a), Fed. R. Civ. P., enters the following findings of fact and memorandum opinion of law.

I

FINDINGS OF FACT

A. Historical Perspective

(1) The evidence presented has established isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system.[1] Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in high schools in the 1930's and 1940's and

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[1] Section 3313.48, Ohio Revised Code, provides in relevant part that:

> "[t]he Board of Education of each city . . . shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof . . ."

This has been the law of Ohio since February 22, 1887, when it was enacted by 85 Ohio Laws 34. The statute was upheld and enforced in 1888 by the Supreme Court of Ohio in *Board of Education* v. *State*, 45 O.St. 555, as follows:

> "Section 4008 having been repealed by the Act of the General Assembly passed February 22, 1887 (84 Ohio Law 34), separate schools for colored children have been abolished and no regulation can be made under 4013 that does not apply to all children, irrespective of race or color:"

the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference.[2]

Prior to *Brown*, however, physical isolation of black students ended, swimming pools were no longer restricted, and black athletic teams competed on an equal basis with all other Dayton High Schools.

While arguably consistent with the social mores of the times, the treatment of black children during this period was at least inhumane and by present standards, reprehensible. The practices of the Dayton School Board were also, during that period, in contravention of Ohio law as cited in n.1, *supra*. Both by reason of the substantial time that has elapsed and because these practices have ceased, however, the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy.

(2) Not to be dismissed on a *deminimus* theory are the practices of the Dayton School Board with regard to the hiring and placement of its teachers. In the past thirty-odd years three separate policies have been followed. Until the decade of the 1930's, there was little, if any, hiring of black teachers. Those who were hired were used in instruction of predominately black classes. During and following World War II the black population of Dayton substantially increased. Black teachers were hired in greater number, although such teachers did not teach in schools which were predominately white. While there is no direct evidence that black teachers were forbidden to teach white children at any school, in practice few actually did. Some evidence consistent with the assumption that black educators and black principals would be more understanding, sympathetic, and inspiring to black students has been suggested to the Court.

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[2] For a period in the 1930's and 1940's, the Shawen Acres Orphan Home sent its black and white wards to different schools. Some white children of medical personnel of the Veterans Hospital in Dayton were bused by the hospital to "white" schools. The Dayton School Board, while not initiating these practices, condoned and assisted them.

In the 1951-52 school year, the policy of assigning black teachers only to black schools ended and black teachers were gradually assigned to white or mixed schools. By 1963, under a policy designated as one of "dynamic gradualism," at least one black teacher had been assigned to all eleven high schools and to 35 of the 66 schools in the entire system.

By 1969 each school in the Dayton system had an integrated teaching staff consisting of at least one black faculty member. In the fall of 1971, pursuant to an agreement with the Department of Health, Education & Welfare (H.E.W.), the Dayton Board of Education commenced assigning faculty in such a manner that the ratio between black and white teachers in each school substantially reflected the ratio between black and white teachers in the system as a whole. Pursuant to this agreement the teaching staff of the Dayton Public Schools became and still remains substantially integrated.

By 1969 the Dayton School Board employed more black teachers than any other of the 20 largest school districts in Ohio. At that time 28.6% of all teachers were black while 38.3% of all students were black. For the school years 1971-72 and 1972-73, blacks comprised 38% of the non-teaching, non-administrative personnel employed by the Board of Education. Employment of blacks in other positions such as skilled craftsmen, however, remains substantially below the percentage of black students population or the percentage of black teachers and black administrators.

(3) In 1933, the Paul Lawrence Dunbar High School was established. Dunbar High School was intended to be, and did in fact became, a black high school, with an all black teacher and pupil population. At the time of its creation, there were no school attendance zones in Dayton and students were permitted liberal transfers. Attendance at Dunbar was voluntary.

In the 1940's and early 1950's, after reorganization into a K-8, 9-12 grade structure, high school and elementary school

attendance zones were established and enforced in Dayton. Dunbar continued to exist as a city-wide all-black high school until it closed in 1962.

B. The Dayton Public School System Today

(a) Racial Imbalance

(4) The great majority of all schools in the Dayton system today have student populations which are racially imbalanced, consistent with the black-white population and geographical distribution thereof as shown by the 1970 census.[3] Except at the Patterson Co-op High School, where in the past few years a concerted effort has been made to enroll more black students, no effort has been made by the school board of Dayton to balance by race the student population at any particular school. See Appendix A, *post* at 15.

(b) Attendance Zones

(5) There has been presented no evidence of boundary changes that would channel blacks or whites into specific schools or would restrict blacks from attending any school. Where construction of new schools has required boundary changes, they have been rational, reasonable and within the sound discretion of the Board of Education. No irregular school zones have been created, white students have not been bused past black schools to white schools, nor have black students been bused past white schools to black schools.

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[3] The 1970 census for the city of Dayton indicates 71 census tracts, 45 with a black population of less than 15%, eight with a black population between 15% and 85%, and six with a black population of 85% to 100%.

While the Dayton School District is not geographically identical to the city limits of the City of Dayton, the variations are non-significant in the context of the areas' black-white population.

(6) The Dayton School District contains 57 elementary school attendance areas. No evidence has been presented of gerrymandered boundary lines and the attendance districts are regular in shape. Boundary line changes have occurred only when new schools were constructed for the purpose of relieving overcrowding in existing ones. See Appendix A, *post*, at p. 15.

(7) The middle school program was established on January 4, 1971. Middle schools consist of grades 6, 7 and 8. The middle school program has to date been only partly effectuated in the Dayton system. Elementary schools (kindergarten through eight) are still in operation as well as primary schools (kindergarten through five), and middle schools (six through eight). At the present time there are five middle schools in Dayton: Cornell Heights, Longfellow, MacFarlane, Whittier, and Orville Wright. For the racial compositions of these schools, see Appendix A, *post*, at p. 15.

Attendance boundaries for the middle schools were established in September, 1971, and have neither segregative nor integrative effect.

(8) There are presently eleven high schools in Dayton, ten of which have specific attendance areas. The eleventh, Patterson Co-op High School, enrolls students from the entire district for its vocational education program. The black percentage of attendance at Patterson High School has increased due to an altering of recruitment techniques, from 2.0% in 1963 to 32.9% in 1972. No evidence has been presented that under the present selection system the admision of blacks is denied or discouraged or that the system is segregative in effect.

Dayton has constructed five high schools since 1954 and has altered attendance zones where necessary to accommodate the overcrowding of existing high schools. Other than such alterations, no attendance zone boundaries have been changed. No evidence of the establishment of high school boundary lines for the purpose of creating white high schools and black high schools has been presented.

(c) Site selection and construction

(9) Since 1954 the school board of Dayton has constructed 14 new elementary schools and 60 elementary school additions. The construction follows the pattern of growth in the Dayton area and follows the specific policy of "building schools where children are, or where they are expected to be." New construction of elementary schools was largely on the periphery of the center city. There are instances of errors in Board planning in that some areas have not developed as expected and other developed areas have not become part of the Dayton School District, as expected. There are examples of schools operating substantially below capacity. While reasonable minds might reasonably differ on selection and construction of some schools, sufficient evidence has not been presented that school construction was segregative in nature other than to provide schools in white neighborhoods which remain predominatly white and schools in black neighborhoods which remain predominately black.

(10) Five new high schools and fourteen high school additions have been constructed in the past eighteen years. Constructions of some high schools followed the pattern of construction of elementary schools in that sites selected were away from the center of the city and in neighborhoods which were predominately white. Other sites could have been selected near the center of the city in black neighborhoods. Such schools would arguably, at least, have had a larger proportion of white attending such schools.

Site selection is a matter of judgment and no evidence has been presented that the Board of Education failed to use neutral criteria in its choices. In the construction of schools, the Board, over the years, has been presented with options. Plaintiffs have failed to sustain their burden of showing that the defendant Board exercised those options presented in an improper fashion.

(d) Optional zones

(11) The Board of Education of the Dayton School District has from time to time created optional zones. Optional zones are dual or overlapping attendance areas which allow children residing within them a choice among two or more schools. Some optional attendance zones were created where the more distant school geographically had better access; some were created where the more distant school did not require the crossing of busy intersections, commercial areas, or railroad tracks. Many were created for the convenience of parents. There has been evidence that at times this last concept embraced desires motivated by racial considerations. Seven optional elementary zones and four optional high school zones exist at the present time. All of the others have been abolished. See Appendix B, *post* at 16.

The majority of optional zones had no racial significance at the time of their creation. The Westwood-Jackson, Roosevelt-Colonel White, and Fairview-Roth zones may have constituted exceptions to this general rule and we cannot conclude that these did not have adverse racial effects. Similarly, although none of the elementary school optional zones today have any significant potential effects in terms of increased racial separation, the same cannot be said of the high school optional zones. Two of these zones, those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past.

(e) Freedom of Enrollment

(12) By two separate actions the Board of Education has established a "freedom of Enrollment" policy. On May 29, 1969, action was taken whereby the parents of a pupil in good standing in the Dayton Public School District could request

assignment of the pupil to any school building within the district where space was available to accommodate him. Three priorities were established.

(1) Students residing within the attendance area of a school building shall have first priority to assignment to that building.

(2) Students meeting the requirements for a course available only in the particular building shall have second priority for attendance in that building;

(3) A student desiring enrollment in any building for whatever reason shall have third priority in that building, providing his enrollment will contribute to improved racial balance in that building.

The action of May, 1969, further provided that transportation would be the responsibility of the parents.

On January 3, 1972, the Board of Education resolved to continue the Freedom of Enrollment policy with the exception that the Superintendent and his staff were directed to develop and submit before the start of the second semester of the 1971-72 school year a plan providing for the free transportation of the students participating in such program. Such free transportation was adopted by the Board prior to the filing of the complaint herein.

(13) Applications for transfer and dispositions thereof during the school years 1969-1970, 1970-71, 1971-72, 1972-73, are set forth in Appendix C, *post*, at 17. There is no evidence that the Freedom of Enrollment system has been unfairly operated or that black students have been denied transfers because of their race. There is evidence that the capacity of transferee schools has been underestimated and that projections of future enrollment are substantially overestimated. A neutrally administered freedom of enrollment system might in the future reduce somewhat racial imbalance and remove community perception of "black" and "white" schools. However, as the Freedom of Enrollment system is presently constituted, its input towards that goal has been slight. Requests for

transfer have at no time exceeded 1.5% of the total student enrollment.

C. School Board Action — December, 1971 January, 1972

(14) At the general election in November, 1971, the electors of the school district of Dayton elected three members for a four year term commencing January 1, 1972. Issues at such election involved the matter of school attendance zones and transportation of pupils. Two incumbent members of the Board ran for reelection, one did not. One incumbent was reelected and two new members of the Board were added. On December 8, 1971, the 1971 Board met to consider resolutions dealing with transportation of students and zone attendance lines. All members present were duly elected, qualified and acting members of the Board, although two of them were so-called "lame ducks," who would not be members of the Board after December 31, 1971.

The Board adopted several resolutions. These resolutions recognized the existence of racial segregation in the Dayton schools, the role played by the Board in the creation of the racial patterns and the concommitant responsibility of the Board to eradicate these patterns through affirmative action. The types of affirmative action recognized included the elimination of the old attendance zones and the transportation of students for the purpose of achieving the city-wide racial balance of students. These resolutions, which are set forth in part in Appendix D, *post*, at 18-22, were adopted by the Dayton School Board by a vote of 5-2.

Immediately thereafter, one member of the Board who had voted with the majority, requested reconsideration and was improperly ruled out of order. The Board met subsequently on December 6, 1971 [sic], and January 3, 1972. At the end of the latter meeting, the Board ended its term of office and the 1972 Board took its place. On January 3, at its first meeting, the 1972 Board rescinded the resolutions passed on

December 8. Since the 1971 Board had passed out of existence, the action of the 1972 Board on January 3, 1972, was not in the nature of a reconsideration but instead was a recission of the previous action.

The right of the majority to override protected minority rights has clear limitations in our constitutional democracy. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); also see *Alkire* v. *Cashman*, —— F.Supp. —— (S.D. Ohio E.D. 1972). The recission in early 1972 of the resolutions adopted by the 1971 School Board constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton. See *Bradley* v. *Milliken*, 433 F.2d 897 (C.A.6 1970); *Oliver* v. *Kalamazoo Board of Education*, 346 F.Supp. 766 (W.D. Mich. S.D. 1971), *aff'd.* 448 F.2d 635 (C.A.6 1971).

OPINION

An examination of the decisional law of this circuit does not provide an identifiable category for the Dayton Public School System. Ohio law, unlike the law of many Southern states, has never mandated the separation of the races in public school; to the contrary, since 1887 it has specifically prohibited this practice. See n.1, supra. The Dayton system is a square peg for the round holes of Memphis, Knoxville, and other southern cities.[4] It is, however, also a round peg

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[4] Compare, for example, the intransigence of the Nashville School Board in *Kelley* v. *Metropolitan County Bd.*, —— F.2d —— Nos. 71-1778 & 79 (C.A. 6 May 30, 1972). See also *Northcross* v. *Board of Education of Memphis*, 420 F.2d 546 (C.A.6 1970), *aff'd.* 397 U.S. 232 (1970); 444 F.2d 1179, 1184 (C.A.6 1971); *Goss* v. *Board of Education of Knoxville*, 301 F.2d 164 (C.A.6 1962); 305 F.2d 523 (C.A.6 1962); 406 F.2d 1183 (C.A.6 1969); 444 F.2d 632 (C.A.6 1971); *motion for implementation order denied*, 403 U.S. 956 (1971); *Robinson* v. *Shelby County Board of Education*, 442 F.2d 259 (C.A.6 1971); *Mapp* v. *Board of Education of City of Chattanooga*, —— F.2d —— (C.A.6 October 11, 1972), *rehearing en banc granted* —— F.2d —— (C.A.6 1972).

for the square hole that is Cincinnati in *Deal* v. *Board of Education*.[5] In *Deal*, which dealt with an urban school system organized under the laws of Ohio, there was no finding that the actions of the school board had contributed in *any* fashion to the segregation of the Cincinnati public schools. We have not found the *Keyes* situation of the transfer of whites to remaining predominately white schools.[6] We have not found the *Bradley* altered attendance zones or the transfer programs that allowed whites to escape from identifiably black neighborhood schools.[7] We have not found the *Davis* pattern of racial discrimination.[8]

What we have found are racially imbalanced schools, optional attendance zones, and recent Board action, which are cumulatively in violation of the Equal Protection Clause. We hold that the totality of these findings require intervention by this Court under the mandate of *Brown* v. *Board of Education*, *supra*.

We do not hold that a school board may not in its wisdom determine to establish 'neighborhood schools." *Gilliam* v. *School Board of Hopewell*, 345 F.2d 325; *Deal*, *supra*; *Goss*, *supra*. But an "optional attendance zone" is a limitation upon this

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5 369 F.2d 55 (C.A.6 1966); 419 F.2d 1387 (C.A.6 1969), *cert. den.* 402 U.S. 962 (1971).

6 *Keyes* v. *School District No. 1*, 303 F.Supp. 279, 289 (D.C. Colo. 1969); 313 F.Supp. 61, 90 (D.C. Colo. 1970), *aff'd. in part, rev'd. in part*, 445 F.2d 990 (C.A.10 1971), *cert. granted* —— U.S. —— (1972).

7 *Bradley* v. *Milliken*, 338 F.Supp. 582 (E.D. Mich. 1971), *aff'd.* —— F.2d ——, Nos. 72-1809, 72-1814 (C.A.6 Dec. 8, 1972), *rehearing en banc granted* —— F.2d —— (C.A. 6, Jan. 16, 1973). See also *Clemons* v. *Board of Education of Hillsboro*, 228 F.2d 853 (C.A.6 1956).

8 *Davis* v. *School District of Pontiac*, 443 F.2d 573 (C.A.6 1971), *cert. den.* 404 U.S. 913 (1971).

concept and if carried to an ultimate conclusion, effectively destroys it. If a school board elects to use the neighborhood school concept, it must do so fully and completely. Where there are hazards, natural or artificial, it must so adjust the boundaries in order to protect the children it intends to educate. It may not employ optional zones either to destroy or dilute the neighborhood school concept.

In addition, there appear to be aspects of the system which may in the future become segregative in effect unless steps are now taken that will retard these undesirable tendencies. Without seeking to calibrate the degree of segregation that inheres in individual policies of the Board, we hold that these must be refashioned in such manner as to avoid such future racially disharmonious potential.

Accordingly, the Dayton School Board is hereby instructed to prepare and present to this Court within sixty (60) days a plan that will accomplish the following:

(1) Abolish all optional attendance zones presently remaining within the Dayton school system;

(2) Restate the priorities for high school attendance in the freedom of enrollment plan in order that no student of a minority race may be denied attendance at any high school in the Dayton Public School System and so that transfers for purpose of improving racial balance take precedence over curriculum transfers;

(3) Maintain faculty assignment policies that will reflect in each school the approximate ratio of black to white faculty throughout the district.

(4) Establish hiring policies that will enable the clerical and maintenance personnel hired by the school board of Dayton to approximate the proportion of black-to-white ratio of the Dayton School District.

The foregoing enumerated specifics shall be considered as a minimum. The plan submitted by the defendant Board shall

in all other respects conform to the requirements of law. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970); *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 402 U.S. 33 (1970).

Irrespective of the determination of this Court there will remain in the city of Dayton a substantial black population entitled as a matter of law to equality in education, housing, and job opportunity. No peaceful community can consist of two separate societies viewing each other with mistrust and suspicion from ever higher walls of separation. Education has been historically in our country and remains to this day, one of the primary means of overcoming barriers of class, status and occupation.

A court can only enjoin upon a school board its legal duty. It cannot reach the infinitely more sensitive moral obligation that defies legal measurement. We commend to the School Board of the City of Dayton its moral obligation to provide the highest possible level of education equally for all children entrusted to its care, without distinction or bias or partiality.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX A, FEBRUARY 7, 1973 FINDINGS OF FACT RACIAL COMPOSITION OF DAYTON PUBLIC SCHOOLS (1971-1972)

Elementary schools — % Black:

1. Jane Addams	81.7	27. Jackson Primary	98.8
2. Allen	0.6	28. Jefferson Ele.	60.1
3. Belle Haven	5.0	29. Jefferson Primary	57.1
4. Belmont	0.0	30. Kemp	0.0
5. Brown	0.6	31. Lewton	0.0
6. Carlson	99.0	32. Lincoln	0.0
7. Cleveland	0.0	33. Loos	4.6
8. Drexel	5.7	34. Horace Mann	0.2
9. Eastmont	0.0	35. McGuffey	14.4
10. Edison	97.3	36. McNary Park	99.4
11. Emerson	6.8	37. Meadowdale Ele.	8.0
12. Fairport	0.1	38. Miami Chapel	99.9
13. Fairview Elementary	1.7	39. Patterson-Kennedy	0.0
14. Ft. McKinley	0.0	40. Residence Park Ele.	98.8
15. Franklin	0.0	41. Residence Park Pri.	99.3
16. Gardendale	28.5	42. Ruskin	7.0
17. Gettysburg	5.2	43. Shiloh	0.1
18. Gorman	21.1	44. Shoup Mill	7.1
19. U.S. Grant	0.1	45. Louise Troy	100.0
20. Grace A. Greene	96.8	46. Valerie	7.5
21. Hawthorne	0.0	47. Van Cleve	1.1
22. Hickorydale	6.6	48. Washington	19.4
23. Highview	97.0	49. Weaver	99.9
24. Huffman	0.0	50. Webster	0.0
25. Irving	99.0	51. Westwood	99.4
26. Jackson Elementary	99.1	52. Wogaman	100.0

Of 52 elementary schools in use as of September, 1972, 29 are more than 90% white and 15 are more than 90% black. The balance range from 19.4% to 60.1% black.

Middle schools — % Black:

1. MacFarlane	99.6
2. Whittier	99.3
3. Cornell Heights	80.5
4. Longfellow	64.1
5. Orville Wright	8.1

High Schools — % Black:

1. Dunbar	100.0
2. Roosevelt	100.0
3. Roth	95.8
4. Colonel White	54.6
5. Patterson Co-op	32.9
6. Fairview	24.1
7. Stivers	14.0
8. Meadowdale	10.6
9. Kiser	9.8
10. Wilbur Wright	9.2
11. Belmont	5.2

APPENDIX B TO FEBRUARY 7, 1973 FINDINGS OF FACT
EXISTING OPTIONAL ZONES

Optional Zone	Date of Creation	Percentage Black School Population At date of creation	1972-73
Elementary schools:			
1. Belle Haven/	1955	0.0	17.7
Fort McKinley		0.0	2.6
2. Residence Park/	1954	a.	100
Jane Addams		29.3 b.	78.7
3. Westwood Ele./	1952	0.0	99.7
Jackson Ele.		35.9	99.9
4. Lincoln/	1957	0.0	0.6
HoraceMann		0.0	3.1
5. Cleveland/	1956	0.0	0.8
Belmont Ele.		0.0	9.4
6. Grant/	1957 c.	0.0	0.3
Belmont		0.0	9.4
7. Eastmont	1957 c.	0.0	0.7
Lewton		0.0	5.8
High schools:			
1. Fairview/	1965	0.9 c.	24.1
Roth		53.5 c.	95.8
2. Roosevelt/	1951	31.5	100.0
Colonel White	extended 1958	0.0	54.6
3. Kiser/	1962	2.7 c.	9.8
Colonel White		1.1 c.	54.6
4. Wilbur Wright/	1956	2.2 b.	9.2
Belmont High		0.0	5.2

a. Figures not available
b. Figures as of 1951
c. Figures as of 1963-1964

APPENDIX C TO FEBRUARY 7, 1973 FINDINGS OF FACT
FREEDOM OF ENROLLMENT APPLICATIONS

	1969-70 1970-71	1971-72	1972-73
White applications	133	78	47
Black applications	695	757	741
Totals	828	835	788
White approvals	50	39	23
Black approvals	421	460	460
Totals	471	499	483
White disapprovals	83	76	15
Black disapprovals	274	260	187
Totals	357	336	202
White disapprovals (Lack of classroom space)	16	8	12
Black disapprovals (Lack of classroom space)	164	174	166
Total disapprovals (Lack of classroom space)	180	182	178

APPENDIX D TO FEBRUARY 7, 1973 FINDINGS OF FACT
RESOLUTIONS OF THE DAYTON SCHOOL BOARD

At the December 8, 1971, meeting of the Dayton School Board, the following three resolutions were passed, each by a 5-2 vote:

RESOLUTION SEEKING JOINT ACTION TO END SEGREGATION IN EDUCATION, HOUSING AND EMPLOYMENT IN THE METROPOLITAN DAYTON AREA

WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Dayton metropolitan area and other parts of Ohio; and the actions and inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

2. That this Board recognizes that past actions or inactions

of the Board of Education and residential racial segregation are interdependent phenomena.

3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society.

RESOLUTION ASKING FOR STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS

WHEREAS, The Committee of 75 has recommended school integration on a metropolitan basis, and

WHEREAS, the State of Ohio has responsibility and authority for the operation of public schools, and the State Board of Education has the duty to administer the laws relating generally to the operation of the schools, and

WHEREAS, the Ohio Attorney General has ruled that the State Board of Education has the authority to restrict funding in any school district in which said Board finds as a matter of fact that racial segregation exists,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby petitions the State of Ohio and the State Board of Education (a) to obtain from Ohio Civil Rights Commission, U.S. Office of Education and such other sources as it may deem useful, data on racial isolation of faculty, staffs and pupils within and among the several school districts as presently constituted in the metropolitan Dayton area; (b) to develop guidelines and criteria as may be necessary to assure an educationally and socially viable mix of pupils, within the socio-economic characteristics of the metropolitan area as a whole; (c) to require said districts to cooperate in preparing and implementing a plan for assignment of faculty, staffs and pupils in accordance with said guidelines and criteria, and (d) to assure adequate funding from state and district sources to continue the operation of the schools and the implementation of said plans throughout the period of transition and thereafter.

2. That said plans be developed by September 1, 1972 and fully implemented not later than September 1, 1973.

3. That the Clerk of the Board forward a true copy of this resolution to the Governor of the State of Ohio, the Speaker of the House of Representatives, the President of the Ohio Senate and the President of the State Board of Education.

* * *

RESOLUTION ORDERING THE RACIAL AND ECONOMIC INTEGRATION OF PUPILS IN THE DAYTON PUBLIC SCHOOLS

WHEREAS, the Board of Education of the Dayton City School District recognizes a moral and legal duty to provide quality non-segregated education for all students in the district, and,

WHEREAS, integrated education is vital to the achievement

of quality education for all pupils, black and white, rich and poor, and,

5. That this Board view the racial and ethnic mix of the Dayton City School District and of the metropolitan area as assets; that this population, if reflected in each school, could itself contribute to people's learning from each other; and that as a whole, the metropolitan area represents a nearly ideal cross section of the nation that could permit schools here to become a model of American democracy in action.

6. That this Board hereby invites and urges agencies of the federal, state, and local governments and organizations of religious, business, labor, education, communications, civic service, and real estate to assist the Board in desegregation of Dayton schools and to pledge publicly their accelerated efforts to bring about desegregation in housing, education and employment throughout the Dayton metropolitan area.

7. That the Clerk of The Board be and hereby is directed to forward a true copy of this resolution to the following:
   - Governor of the State of Ohio
   - President of the State Board of Education
   - Speaker of the Ohio House of Representatives
   - President of the Ohio Senate
   - Montgomery County Members of the Ohio General Assembly and United States Congress.
   - Montgomery County Commissioners
   - Dayton City Commissioners
   - Montgomery County Council of Governments
   - City Plan Board
   - Miami Valley Regional Planning Commission
   - Miami Valley Regional Transit Authority
   - Metropolitan Housing Authority
   - Apartment Owners Associations
   - Area Progress Council

- Assembly of Area Councils
- Chairmen of Democratic and Republican Organizations
- Community Affairs Committee
- Congress of Representative East Dayton Organizations
- Dayton Advisory Council on Education
- Dayton Area Board of Realtors
- Dayton Area Chamber of Commerce
- Dayton Area Junior Chamber of Commerce
- Dayton Building Trades Council
- Dayton Classroom Teachers Association
- Dayton-Miami Valley AFL-CIO
- Dayton Model Cities Planning Council, Inc.
- Dayton Public Service Union
- Dayton Urban League
- Deans of Area Colleges of Education
- Elementary Principals Association
- Metropolitan Churches United
- Miami Valley Consortium of Colleges and Universities
- Montgomery County Community Action Agency
- Montgomery County Council of PTAs
- National Association for the Advancement of Colored People
- Ohio Association of Public School Employees
- Presidents Club
- Secondary Principals Association
- Southern Christian Leadership Conference

WHEREAS, the Fourteenth amendment to the United States Constitution and the mandate of the United States Supreme Court in Brown v. Board of Education decision and subsequent court decisions place an affirmative duty to dis-establish the segregated attendance patterns which result in whole or in part from its actions and inactions in order to equalize educational opportunity, and,

WHEREAS, segregated educational opportunity and unequal educational opportunities for minority and poor students now exist in the Dayton public schools, and,

WHEREAS, this inequality exists as a result of the acts and omissions of the Board and preceding Boards in their decisions concerning the site selection of school buildings, size of school buildings, changes and adoption of school attendance boundaries, pupil assignment practices, faculty and staff hiring and assignment practices and,

WHEREAS, this Board has requested and received reports of findings and recommendations from the State Department of Education and the Committee of 75,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton that it is the policy of this Board that each school shall enroll pupils in a manner which substantially reflects the racial and economic characteristics of the district as a whole. The Board recognizes that implementation of this policy requires departure from past practices and requires special planning to assure a smooth transition. The Board therefore directs:

1. That the superintendent in consultation with professional staff and the representatives of employee organizations, design and implement a mandatory program of in-service education involving all staff members to prepare staff for changes in enrollments and to develop an individualized, multi-ethnic curriculum in each school.

2. That Dayton Advisory Council on Education be requested to organize a Community Involvement Advisory Committee and a Lay Citizens Financial Review Committee to advise the superintendant during the course of planning and implementing integration programs, as recommended by the Committee of 75.

3. That the superintendent be and hereby is directed to develop and implement plans for the racial and economic integration of pupils using the following guidelines and criteria:

a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

e. Desegregation is to be completed by September, 1972.

f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criterial in c. above.

g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy.

4. That to the maximum feasible extent consistent with this policy statement, recommendations of the Committee of 75, are hereby adopted and may be used in planning and implementing school integration.

5. That the superintendent report on progress and problems concerning implementation of this policy at least every sixty days and that a program for continuous evaluation throughout the phases of implementation be developed by July 31, 1972.

6. That the superintendent prepare applications for supplementary financial assistance from state, federal and other sources that may become available to improve the quality of education and achieve the goals of the Committee of 75 report.

B. JULY 13, 1973 SUPPLEMENTAL OPINION ON REMEDY OF DISTRICT COURT

(Filed July 13, 1973)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al,

Plaintiffs

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al,

Defendants

SUPPLEMENTAL ORDER ON REMEDY

Pursuant to order of this Court dated February 7, 1973, the defendant School Board of the City of Dayton has submitted a desegregation plan for consideration. A separate plan has been submitted by the minority members of the Dayton School Board, as has one by the Dayton Classroom Teachers' Association, whose motion to file as amicus curiae in this matter is hereby GRANTED. Exhaustive memoranda have likewise been filed by interested parties. The matter is now before the court for determination.

The plan submitted by the defendant Board contains eleven points: Four are directed to the specific requirements imposed by this Court and seven are in response to the Court's sugges-

tion that additional action be undertaken. Such additional action was not specifically mandated by the Court. We do, however, note our disappointment at the limited nature of Points V through XI. While defendant School Board can assert that it was not required by the Court to go as far as it has, a response can be made with equal accuracy that the community relies on the elected members of the School Board to approach the present problem in a sensitive and understanding fashion. The Board's proposals, unfortunately, do not convince us that they have completely attained this desired goal.

We turn to the four points of the plan required by the Court's order. Point I eliminates the optional zones and their attendant segregatory effects. Point III provides for non-racially based faculty assignment practices. Point IV provides for the proper hiring policies of classified personnel. Points I, III and IV are in accord with the requirements of the Court's previous order and as to them, the plan of defendant School Board of the City of Dayton is hereby APPROVED.

Point II, however, which deals with Freedom of Enrollment Priorities, does not entirely meet the required standards. It will be conditionally accepted for elementary schools and middle schools for the school year 1973-74. It will not be accepted for the high schools.

As to the Dayton high schools, the Board is hereby directed to achieve the following:

(1) Any student eligible to attend a Dayton public high school may attend any high school within the Dayton Public School district, provided that students presently enrolled in high schools shall have first priority to complete their education therein.

(2) Each incoming ninth grade class and all vacancies in the tenth, eleventh and twelfth grade classes shall be filed from those pupils seeking admission. Where there is insufficient capacity for all pupils seeking admission, a random selection plan shall be used.

(3) Only insufficient capacity shall be deemed reason to exclude any applying pupil.

(4) Transportation shall be the responsibility of the Board of Education for all students eligible and approved for transfer outside of the attendance area of such students' residences.

The defendant Board of Education will submit to this Court within thirty (30) days of the date of this Order a revised plan to comply with the above. Included in such plan will be a listing of the pupil capacity by grade of each of the high schools within the Dayton Public School District. Plaintiffs will be granted an opportunity to present evidence as to such capacity. The foregoing admission plan shall not apply to the Patterson-Stivers Vocational High School.

There remain for consideration two further questions which the Court has reserved: The matter of the so-called Metropolitan School District and the status of defendants State of Ohio through its Governor and the Ohio Department of Education.

The findings by the Court in its Order of February 7, 1973, and the disposition of the Board of Education's plan appear to moot the metropolitan question and to require the dismissal of these non-Dayton defendants. Plaintiffs are hereby granted thirty (30) days within which to file memoranda on either or both of these questions. Defendants are granted thirty (30) days from the date of such filing to file answer memoranda and plaintiffs are granted thirty (30) days from defendants' filing to file reply memoranda. An evidentiary hearing will be granted upon either of such questions upon the showing of a need therefor.

This supplemental Order has been delayed pending study of the decision of the Supreme Court of the United States in *Keyes* v. *School District No. 1, Denver, Colorado*, —— U.S. ——, 42 U.S.L.W. 5002 (June 21, 1973). The *Keyes* case dealt, for the first time, with a large northern city whose school

system had never been operated under mandatory segregation laws, but which had nevertheless acted in a way that helped create a racially segregative system. It is significant both as a major landmark in the continuing definition of the Equal Protection clause within the context of school desegregation that began with *Brown* v. *Board of Education*, 347 U.S. 483 (1954); and as an indication of the views and attitude of the present Supreme Court. It will of necessity have a major impact upon the future direction of the public school systems in the United States including the one in Dayton, Ohio.

The concurring opinion of Justice Powell must rank among the clearest and most logical expositions of a most troubling and difficult subject. This court proposes to follow the rationale set forth by Justice Powell. We place the burden upon the Board to comply to the fullest extent possible with the views stated therein. We place particular significance on the following statement of Justice Powell:

> "The Term, "integrated school system,' presupposes, of course, a total absence of any laws, regulations or policies supportive of the type of 'legalized' segregation condemned in *Brown*.
>
> "A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to: (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instructions and curricula opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; and (iv) locate new schools, close to old ones, and determine the size and grade categories with the same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind."

This Court likewise adopts as its guiding definition the following statement from Justice Powell:

> "An integrated school system does not mean, and indeed could not mean, in view of the residential patterns of most of our major metropolitan areas, that *every school* must in fact be an integrated unit. A school which happens to be all or predominately white or all or predominately black is not a 'segregated' school in an unconstitutional sense if the system itself is a genuinely integrated one."

Keyes v. *School District No. 1, Denver, supra,* 41 U.S.L.W. at 5012.

Relating the standards established by Justice Powell to the Dayton situation, the Court has found that appropriate steps to integrate faculties and administration have been instituted and will be continued. There has been and there will be an increasing level of transportation of students for the purpose of promoting integrative opportunities through the Freedom of Enrollment priorities.

There is presently no evidence of a failure of equality of facilities, instructions and curricula opportunities nor has there been a persuasive proof that the Board, in recent times, drew attendance lines or built new facilities for the avowed purpose of minimizing integration. However, there has been evidence which indicates that the affirmative promotion of integration through these essential functions of the Board has not held an important place in the Board's priorities.

The Powell rationale will operate prospectively. The Board's planning and implementation units must become capable of and sensitive to the racial effects which flow from the drawing of attendance lines, the construction and improvement of school facilities and the assignment of faculty, staff and pupils. All of such actions must henceforth be examined for their "integration impact."

These are long range goals and a further opportunity should be given to the Dayton School Board in which to plan and implement them. Accordingly, while this Court is most reluctant to continue a "federal receivership" of the Dayton School System, see *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5022 (Rehnquist, J. dissenting), it would seem that a proper disposition of this problem requires a retention of jurisdiction while a reasonable period of time is given to the School Board for this purpose. Therefore, as to these long-range criteria, the Court will re-examine the Dayton School System at the end of academic year 1973-74 and determine, at that time, whether or not additional judicial action is required.

Nothing that we have said today should be interpreted as a repudiation of the neighborhood school concept. To the contrary, it is this concept which often represents the bedrock strength of the public school systems and steps may be properly taken to preserve it. See *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5018-5020 (Powell, J., concurring in part and dissenting in part); *Deal* v. *Cincinnati Board of Education,* 396 F.2d 55, 60 (C.A.6 1966). Where school lines in Dayton have been drawn without improper racial intent, they will be allowed to stand. Where they have not yet been drawn, as in the case of the still embryonic system of middle schools, they should be drawn in such a way as to maximize integrative goals.

The essential principle which guides this Court is a paraphrase from *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 at pages 15-16.

It is the function of the federal courts only to eliminate a deprivation of constitutional rights; it is the duty of local school boards to operate and maintain integrated school systems.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
United States District Judge

C. AUGUST 20, 1974 OPINION OF COURT OF APPEALS
(Filed August 20, 1974)

Nos. 73-1974-75

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK BRINKMAN, ET AL.,
Plaintiffs-Appellants,

v.

JOHN J. GILLIGAN, ET AL.,
Defendants-Appellees.

MARK BRINKMAN, ET AL.,
Plaintiffs-Appellees,

v.

DAYTON BOARD OF EDUCATION,
Defendants-Appellants.

APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division.

Before PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PHILLIPS, Chief Judge. This is a school desegregation case directed against the public school system of Dayton, Ohio. For the reasons set forth below, we affirm in part and remand the case to the District Court for further proceedings.

Plaintiffs-appellants are black and white Dayton parents who bring this class action on their own behalf, on behalf of their minor children, and on behalf of all others similarly situated.

In addition, the National Association for the Advancement of Colored People (NAACP) joined as a party plaintiff. The complaint named the Governor of Ohio, the Attorney General of Ohio, the Ohio State Board of Education, the Superintendent of Public Instruction of the Ohio Department of Education, the Dayton Board of Education, the six individual members of the Dayton Board and the Superintendent of the Dayton School District as parties defendants.[1] The Dayton Board of Education has cross appealed.

I. Chronology of Proceedings

In their complaint filed on April 17, 1972, appellants sought, *inter alia*, an injunction enjoining the Dayton defendants from continuing their allegedly unconstitutional policy of operating the public schools in Dayton in a manner that perpetuated racial segregation. The complaint further averred numerous racially discriminatory practices for which the State defendants had allocated educational resources.

The complaint was filed in the United States District Court for the Southern District of Ohio, Eastern Division, which is located at Columbus, Ohio, rather than in the Western Division at Dayton (the situs of the subject schools) on the basis that the State defendants were domiciled in Franklin County (Columbus). Motions to dismiss for failure to join necesary parties and for improper venue and alternative motions to transfer the action to the District Court at Dayton were filed by the State defendants, the Dayton Board of Education and three individual Dayton Board members. On June 22, 1972, the District Court overruled the motions to dismiss for improper venue and denied the motions to transfer, but did not

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[1] Hereinafter, the Governor, Attorney General, State Board of Education, and the Superintendent of Public Instruction will sometimes be referred to collectively as the "State defendants." Hereinafter, the Dayton Board of Education, its members, and its Superintendent sometimes will be referred to collectively as the "Dayton defendants."

rule on the motion to dismiss for want of necessary parties. Thereafter, on July 24, 1972, the Dayton defendants and the State defendants filed their answers denying the material allegations of the plaintiffs' complaint.

In accordance with the proposed order of procedure, an expedited hearing before District Judge Carl B. Rubin, was conducted from November 13 through December 1, 1972, limited to the single issue of whether the school system of Dayton was a segregated one by reason of acts of the Dayton Board of Education. On February 7, 1973, the District Court filed its Findings of Fact and Memorandum Opinion of Law in which it found that (1) racially imbalanced schools, (2) optional attendance zones, and (3) rescission by the Dayton Board of Education of three resolutions calling for racial and economic balance in each school in the Dayton system were "cumulatively in violation of the Equal Protection Clause" of the Constitution. In its February 7, 1973, decision, the District Court ordered the Dayton Board to submit a plan which would (1) abolish all optional zones, (2) restate the priorities of the Board's Freedom of Enrollment program so that racial transfers would take precedence over curriculum transfers, (3) maintain faculty assignment practices so that each school would continue to reflect the approximate ratio of the total black to white faculty in the Dayton system, and (4) establish hiring practices that would enable the clerical and maintenance personnel employed by the Board to approximate the proportion of black-to-white population existing within the Dayton system. The District Court further stated that the foregoing elements "shall be considered as a minimum" and that the plan to be submitted by the Board should otherwise conform in all respects to the requirements of law, citing *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971).

In compliance with the February 7, 1973, order of the District Court, the Dayton Board on March 19, 1973, submitted

a desegregation plan to the District Court. This plan contained eleven points which are summarized below:

I. Elimination of Optional Zones – eliminated optional attendance zones for elementary and high school students.

II. Freedom of Enrollment Priorities – revised the system's Freedom of Enrollment program in accordance with a specified set of priorities.

III. Faculty Assignment Practices – provided that faculty assignments for each school in the system should reflect the ratio of white to black faculty in the entire system.

IV. Hiring Policies for Classified Personnel – provided that blacks would be hired for classified positions, e.g. clerical, custodial and food service staff, to reflect the proportion of the black-to-white population residing within the Dayton School District.

V. Science Environmental Program – proposed the establishment of a city-wide elementary science program guided by a trained staff working at four centers. The program was to be mandatory and children were to be bused to produce a racial mix that approximates the ratio between black and white students in the system as a whole.

VI. Patterson-Stivers Vocational High School – combined two existing vocational schools into a new unified cooperative school with a district-wide attendance area.

VII. The Musical Stereopticon – formed an elementary and high school band orchestra and chorus on an all-city basis.

VIII. Integrated Athletics – required schools that have no minorities on their teams to schedule schools that do have minorities represented. High school schedules were to be administered by a central athletic office to insure that racial isolation did not exist.

IX. Minority Language Program — required all classroom teachers and administrators at the elementary school level to participate in a series of in-service workshops on linguistic differences that exist in American English.

X. Living Arts Center — created departments in art, creative writing, dance and drama to permit studets, teachers, and parents to expand their knowledge in these areas.

XI. Control Centers — created rumor control centers, school guidance centers, and area learning centers to create a more secure climate for quality education in the school system.

In addition to the plan submitted by the Dayton Board, separate plans were submitted to the District Court by the minority members of the Dayton Board and the Dayton Classroom Teachers' Association. The Board minority submitted its more comprehensive plan because it believed that the plan of the Board majority would maintain the status quo and hence did not comply with the February 7, 1973, order of the District Court to conform in all respects with *Swann*, *supra*, and *Davis supra*. Further, the plaintiffs-appellants filed objections to the plan of the Board majority primarily on the grounds that the majority plan "froze in" the present unconstitutional system of segregation and would fail to eliminate racialy identifiable schools when other alternative remedies, such as busing of children to other schools, were available.

On July 13, 1973, after considering the three desegregation plans before it, the District Court issued its Supplemental Order on Remedy. The District Court essentialy accepted the plan of the Board majority except that the Dayton Board was ordered to submit a freedom of choice plan for the Dayton high schools. The District Court, however, expressed its "disappointment at the limited nature of Points V through XI"

of the plan of the Board majority, and stated that the desired goal was not attained completely by the majority plan.

The District Court then stated:

> "There remain for consideration two further questions which the Court has reserved: The matter of the so-called Metropolitan School District and the status of defendants State of Ohio through its Governor and the Ohio Department of Education.
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> "The findings by the Court in its Order of February 7, 1973, and the disposition of the Board of Education's plan appear to moot the metropolitan question and to require the dismissal of these non-Dayton defendants. Plaintiffs are hereby granted thirty (30) days within which to file memoranda on either or both of these questions. Defendants are granted thirty (30) days from the date of such filing to file answer memoranda and plainiffs are granted thirty (30) days from defendants' filing to file reply memoranda. An evidentiary hearing will be granted upon either of such questions upon the showing of a need therefor."

The District Court concluded its July 13, 1973, order as follows:

> "Nothing that we have said today should be interpreted as a repudiation of the neighborhood school concept. To the contrary, it is this concept which often represents the bedrock strength of public school systems and steps may be properly taken to preserve it. See *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5013-5020 (Powell, J., concurring in part and dissenting in part); *Deal* v. *Cincinnati Board of Education*, 396 F.2d 55, 60 (C. A. 6 1966). Where school lines in Dayton have been drawn without improper racial intent, they will be allowed to stand. Where they have not yet been drawn, as in the case of the still embryonic system of middle schools, they should be drawn in such a way as to maximize integrative goals.

"The essential principle which guides this Court is a paraphrase from *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 at pages 15-16.

"It is the function of the federal courts only to eliminate a deprivation of constitutional rights; it is the duty of local school boards to operate and maintain integrated schools systems."

Following the July 13, 1973, order of the District Court, the plaintiffs-appellants in a letter dated July 26, 1973, reminded the District Court that by its own order of procedure evidence with respect to the metropolitan and state aspects of the controversy had been excluded from the earlier hearing. On August 10, 1973, the Dayton Board submitted a revised plan incorporating the court's freedom of choice plan for the Dayton high schools. The plaintiffs-appellants filed their notice of appeal from the two orders of the District Court on July 23, 1973. The Dayton Board cross appealed from those orders on August 13, 1973.

Thereafter, on September 25, 1973, the Dayton Board moved this court to dismiss the pending appeal of the plaintiffs-appellants for want of jurisdiction on the ground that no final order had been entered by the District Court. In an unreported order filed on January 17, 1974, this court denied the Dayton Board's motion to dismiss, saying:

"Said motion to dismiss is hereby denied, it appearing to the court that the District Judge's supplemental order on remedy, dated July 13, 1973, approves a proposed desegregation plan with added instruction as to how it is to be carried into effect, and hence, appears to be in the nature of a temporary injunction under 28 U.S.C. § 1292(a)(1) (1970)."

We have heard oral arguments and the case is now before the court for decision.

II. Historical Background of School Segregation in Dayton

Ohio law has long mandated an integrated public school system. Ohio Revised Code, § 3313.48, provides in relevant part:

"The board of education, of each city, exempted village, local, and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof."

This has been the law of Ohio since February 22, 1887, when it was enacted by 84 Ohio Laws 34. That statute was upheld by the Supreme Court of Ohio in 1888 in *Board of Education* v. *State*, 45 Ohio St. 555, 556, 16 N.E. 373, in which the court stated:

"[S]ection 4008 having been repealed by the act of the general assembly passed February 22, 1887 (84 Ohio L. 34), separate schools for colored children have been abolished and no regulation can be made under section 4013, that does not apply to all children irrespective of race or color."

Further, the District Court made the following historical determination, that is not challenged on appeal, as a finding of fact:

"(1) The evidence presented has established isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system. Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in high schools in the 1930's and 1940's and the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference." (Footnotes omitted.)

The physical segregation into separate buildings of pupils and teachers by race was ruled illegal in *Board of Education of School District of City of Dayton v. State, ex rel. Reese*, 114 Ohio St. 188, 189, 151 N.E. 39 (1926).

In 1956, following *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Ohio Attorney General ruled that the Ohio State Board of Education had the primary responsibility for administering the laws relating to the distribution of state and federal funds to local school districts and that such funds should not be distributed, absent good and sufficient reasons, by the State Board to local school districts which segregated pupils on the basis of race in violation of *Brown*. Despite protests over the past twenty years from the Dayton branch of the NAACP and others, the Dayton Board has maintained a system wherein the great majority of schools today have student populations which are racially imbalanced. The State Board of Education has permitted this system to continue with a steady flow of state and federal money.

On March 17, 1969, the Acting Director of the Office for Civil Rights, United States Department of Health, Education and Welfare (HEW), notified the Dayton School authorities that, as a result of a compliance review conducted by federal officials, his office had concluded that the Dayton school district was not complying with Title VI of the Civil Rights Act of 1964. In particular, the Acting Director stated:

> "An analysis of the data obtained during the review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff. Thus, all Negro principals are assigned to predominantly Negro schools, as are 11 of the 14 Negro assistant principals; 156 out of 181 Negro high school teachers are assigned to schools where Negroes constitute 92 percent of the total enrollment. Over 85 percent of the Negro elementary teachers instruct in schools having a preponderence of Negro pupils, and only 14 percent of teachers

> of the white race are in schools where Negroes are in the majority. The assignment of counsellors and coaches follows a similar pattern.
>
> "The existence in your district of a substantial duality in terms of race or color with respect to distribution of pupils in the various schools, is a matter of concern to us. The fact appears to be that of a total of 5,627 Negro high school pupils, approximately 85 percent are concentrated in 3 high schools in which the percentage of Negro attendence ranges from 92.3 percent to 100 percent. Similarly, 15,479 (approximately 85 percent) Negro elementary pupils attend 20 out of the 53 elementary schools in your district. It is noteworthy that in 17 of these 20 schools, Negroes constitute 90-100 percent of the total enrollment.
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> "Our review also indicates that students at Roosevelt High School are not afforded the same educational opportunity as other students in your system."

On June 7, 1971, the Ohio State Department of Education presented a series of recommendations to the Dayton Board on how to achieve constitutionally required desegregation. In its letter conveying the recommendations, a State Department of Education report stated:

> "As the resolution of April 29, 1971 (of the Dayton Board), admitted, 'the Dayton Board of Education recognizes that unequal educational opportunities for minority students now exists.' Inequality of such opportunities, for minority *and* majority students, has characterized the Dayton public school system throughout its history.
>
> "Since the Board, *as an agency of state government*, has created the inequality which offends the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative

duty to comply with the Constitution; that is, as the Supreme Court has stated, 'to eliminate from the public schools all vestiges of state-imposed segregation.'"

In particular, the State Department report was especially critical of the process of conversion to feeder and middle schools, stating that the following seemed to be occurring:

"1. two sets of schools will be totally black;

"2. racial isolation will actually be increased in one set of schools; and

"3. only in the Dayton View area, which was previously integrated, could conversion to middle schools possibly result in reduction of racial and economic isolation and insulation.

"If what appears to be happening with middle schools is in fact happening, then Dayton has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur."

Although the recommendations of the State Department were not complied with in full, the State Board of Education continued to aid in financing the operation of Dayton schools.

Finally, pursuant to the resolution of the Dayton Board passed at its April 29, 1971, meeting, the President of the Dayton Board appointed a broadly representative committee to evaluate and advise the Board on plans to reduce racial isolation and improve educational opportunities in Dayton. This committee became known as the Committee of 75, although its membership was later expanded to include eleven students. At its first meeting, on August 30, 1971, the Committee was charged as follows by the Board President:

"We recognize, and the statistical data substantiates, the fact that unequal educational opportunities for the poor and black students now exist in the Dayton School District. The Board of Education has gone on record by setting quality integrated education as its goal. We have admitted that the district is guilty of procedures which have led to the racial isolation of school children.

"It is this committee's responsibility to establish the evaluation elements to be applied to a developed plan or plans and advise the Dayton Board of Education accordingly. We do hope that you would set up guidelines and/or methods by which the community will become meaningfully involved.

"You are an arm of the Dayton Board of Education with the task of supplying input to the Board. It remains the responsibility of the Board of Education to make official approval of your point. We feel very strongly that the establishment of this committee is not an attempt to abdicate its responsibility or delegate its authority, but rather an attempt to utilize the enrichment of citizen participation. It is hoped that the school councils, and organized groups of school-oriented citizens of the school district, will be an avenue you may use for additional participation.

"If there be a fear that you are here to architect a master plan for 'busing' – 't'ain't true.' You are here in an attemp to supply your input of the ingredients for excellency to any plan that the administration and/or consultants may recommend. It is our sincere hope that when a plan is set for implementation, it should be that one or the one that embraces the wishes of the citizens of the Dayton School District and not one imposed by federal, state or court mandate."

After several months of study, the Committee of 75 issued its report in the late fall of 1971. The report recognized the

Dayton Board's casual responsibility for the condition of segregation and the imperative need to end one race schooling, and suggested the following tentative approaches to accomplish desegregation in the Dayton school system:

"1. Segregated education, because it perpetuates and condones economic and racial isolation, is both illegal and inferior.

"2. The school children of Dayton have suffered far too long under the crippling handicaps imposed by racial and economic isolation.

"3. We must resolve now as a total community to end inferior segregated education once and for all.

"4. Time is running out. Unless we act now the divisions generated by segregation will destroy us. Unless we act now court orders may impose upon us what all of us will regret.

"5. Initiative in the struggle against segregated education belongs to the Dayton Board of Education. We cannot wait for housing and job patterns to change while we defy the law of the land.

"6. To lift the plague of segregated education in Dayton immediate appeal must be addressed to the school systems surrounding Dayton as well as to the appropriate state and national agencies involved.

"7. Desegregation is not enough. To end racial and economic isolation we must not rest until we have achieved true integration, until the differing ethnic and racial groups among us are able to live side by side in mutual respect.

"8. The personal cost of achieving such true integration will be high because to achieve such integration we must persist in dialogue until the differences that divide us have been resolved. We can no longer allow the fear of busing (to) stifle such dialogue.

"9. The financial cost of true integration will also be high. At least 1 per cent of the current budget, exclusive of federal and state grants, should be allocated to this sector.

"10. Integrated quality education requires constant vigilance. We must not only develop support systems to undergird every group involved in the changes proposed but we must nurture these groups by continuing attention to curricula, buildings, and in-service training."

The report of the Committee of 75 concluded as follows:

"*Summary.* The presence and magnitude of the problem before us needs to be recognized by all the citizens of Dayton. Quality integrated education can help stop the flight to the suburbs, break the cycle of poor education, and the lack of job skills which handicap the minorities. The cost of this type of education will be small in relation to the total benefits society will reap."

Thereafter, at its regular meeting on December 8, 1971, the Dayton Board of Education passed three resolutions in response to the report of the Committee of 75. The first resolution provided, in part, as follows:

"WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

"NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

"1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design

of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Dayton metropolitan area and other parts of Ohio; and the actions or inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

"2. That this Board recognizes that past actions or inactions of the Board of Education and residential racial segregation are interdependent phenomena.

"3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

"4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society."

The second resolution passed by the Dayton Board at its December 8, 1971, meeting requested the assistance of the state and federal governments in desegregating Dayton public schools. The third resolution declared the Board policy to be that each school in the system should enroll pupils in a manner

which substantially reflected the racial and economic characteristics of the district as a whole and directed the school superintendent to implement a plan of desegregation according to the following guidelines:

"a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

"b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

"c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

"d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

"e. Desegregation is to be completed by September, 1972.

"f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criteria in c. above.

"g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy."

Each of the three Board resolutions passed by a 5 to 2 vote after a motion to table the resolution had failed by a 4 to 3 vote.

Subsequently, on January 3, 1972, the newly constituted Dayton Board, the composition of which had been changed by the local elections of November 1971, officially rescinded the three resolutions passed by the prior Board at its December 8, 1971 meeting. The rescission of the three resolutions occurred by votes, respectively, of 4 to 3, 4 to 2, and 4 to 2. The effect of the rescissions was to reinstate the existing attendance zones and the system's Freedom of Enrollment program for

the 1972-73 school year. The present action was filed on April 17, 1972.

III. The Constitutional Violations Found by the District Court

The District Court found three constitutional violations in the Dayton school system, namely, (A) racially imbalanced schools, (B) optional attendance zones, and (C) the Dayton Board's rescission of the three resolutions. These were held by the District Court to be "cumulatively in violation of the Equal Protection Clause." Further, the District Court stated that the rescission of the resolutions "constituted an independent violation" of the constitutional rights of the black minority in Dayton.

We hold that the findings of fact on which the District Court based its conclusion of a cumulative violation are not clearly erroneous but, to the contrary, are amply supported by the evidence. Fed. R. Civ. P. 52(a). However, we do not pass upon the question at the present time as to whether the rescission of the Board resolutions in and of itself constituted an independent violation of the Constitution.

(A) Racially Imbalanced Schools

The District Judge made the following finding of fact:

> "The great majority of all schools in the Dayton system today have student populations which are racially imbalanced, consistent with the black-white population and geographical distribution thereof as shown by the 1970 census. Except at the Patterson Co-op High School, where in the past few years a concerted effort has been made to enroll more black students, no effort has been made by the school board of Dayton to balance by race the student population at any particular school." (Footnote omitted.)

With respect to this finding of fact, the District Judge appended the following chart which graphically demonstrates the racial imbalance in Dayton's sixty-eight public schools.

RACIAL COMPOSITION OF DAYTON PUBLIC SCHOOLS (1971-1972)

Elementary schools — % Black:

1.	Jane Addams	81.7	27.	Jackson Primary	98.8
2.	Allen	0.6	28.	Jefferson Ele.	60.1
3.	Belle Haven	5.0	29.	Jefferson Primary	57.1
4.	Belmont	0.8	30.	Kemp	0.0
5.	Brown	0.6	31.	Lewton	0.0
6.	Carlson	99.0	32.	Lincoln	0.0
7.	Cleveland	0.0	33.	Loos	4.6
8.	Drexel	5.7	34.	Horace Mann	0.2
9.	Eastmont	0.0	35.	McGuffey	14.4
10.	Edison	97.3	36.	McNary Park	99.4
11.	Emerson	6.8	37.	Meadowdale Ele.	8.0
12.	Fairport	0.1	38.	Miami Chapel	99.9
13.	Fairview Ele.	1.7	39.	Patterson-Kennedy	0.0
14.	Ft. McKinley	0.0	40.	Residence Park Ele.	98.8
15.	Franklin	0.0	41.	Residence Park Pri.	99.3
16.	Gardendale	28.5	42.	Ruskin	7.0
17.	Gettysburg	5.2	43.	Shiloh	0.1
18.	Gorman	21.1	44.	Shoup Mill	7.1
19.	U.S. Grant	0.1	45.	Louise Troy	100.0
20.	Grace A. Greene	96.8	46.	Valerie	7.5
21.	Hawthorne	0.0	47.	Van Cleve	1.1
22.	Hickorydale	6.6	48.	Washington	19.4
23.	Highview	97.0	49.	Weaver	99.9
24.	Huffman	0.0	50.	Webster	0.0
25.	Irving	99.0	51.	Westwood	99.4
26.	Jackson Ele.	99.1	52.	Wogaman	100.0

Of 52 elementary schools in use as of September, 1972, 29 are more than 90% white and 15 are more than 90% black. The balance range from 19.4% to 60.1% black.

Middle Schools – % Black:

1.	MacFarlane	99.6
2.	Whittier	99.3
3.	Cornell Heights	80.5
4.	Longfellow	64.1
5.	Orville Wright	8.1

High Schools – % Black:

1.	Dunbar	100.0
2.	Roosevelt	100.0
3.	Roth	95.8
4.	Colonel White	54.6
5.	Patterson Co-op	32.9
6.	Fairview	24.1
7.	Stivers	14.0
8.	Meadowdale	10.6
9.	Kiser	9.8
10.	Wilbur Wright	9.2
11.	Belmont	5.2

Enrollment data from the Dayton system reveals the substantial lack of progress that has been made over the past 23 years in integrating the Dayton school system. In 1951-52, of 47 schools, 38 had student enrollments 90 percent or more one race (4 black, 34 white). Of the 35,000 pupils in the district, 19 per cent were black. Yet over half of all black pupils were enrolled in the four *all* black schools; and 77.6 per cent of all pupils were assigned to virtual one race schools. "Virtual one race schools" refers to schools with student enrollments 90 per cent or more one race. In 1963-64, of 64 schools, 57 had student enrollments 90 per cent or more one race (13 black, 44 white). Of the 57,400 pupils in the district, 27.8 per cent were black. Yet 79.2 per cent of all black pupils were enrolled in the 13 black schools; and 88.8 per cent of all pupils were enrolled in such one race schools.

In 1971-72 (the year the complaint was filed), of 69 schools, 49 had student enrollments 90 per cent or more one race (21 black, 28 white). Of the 54,000 pupils, 42.7 per cent were black; and 75.9 per cent of all black students were assigned to the 21 black schools. In 1972-73 (the year the hearing was held) of 68 schools, 47 were virtually one race (22 black, 25 white); fully 80 per cent of all classrooms were virtually one race. (Of the 50,000 pupils in the district, 44.6 per cent were black).

Every school which was 90 per cent or more black in 1951-52 *or* 1963-64 *or* 1971-72 and which is still in use today remains 90 per cent or more black. Of the 25 white schools in 1972-73, *all* opened 90 per cent or more white and, if open, were 90 per cent or more white in 1971-72, 1963-64 and 1951-52.

(B) Optional Attendance Zones

The District Judge made the following finding of fact:

> "(11) The Board of Education of the Dayton School District has from time to time created optional zones. Optional zones are dual or overlapping attendance areas which allow children residing within them a choice among two or more schools. Some optional attendance zones were created where the more distant school geographically had better access; some were created where the more distant school did not require the crossing of busy intersections, commercial areas, or railroad tracks. Many were created for the convenience of parents. There has been evidence that at times this last concept embraced desires motivated by racial considerations. Seven optional elementary zones and four optional high school zones exist at the present time. All of the others have been abolished.
>
> "The majority of optional zones had no racial significance at the time of their creation. The Westwood-Jackson, Roosevelt-Colonel White, and Fairview-Roth

zones may have constituted exceptions to this general rule and we cannot conclude that these did not have adverse racial effects. Similarly, although none of the elementary school optional zones today have any significant potential effects in terms of increased racial separation, the same cannot be said of the high school optional zones. Two of these zones, those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past."

The testimony of Dr. Gordon Foster, Director of the Florida School Desegregation Consulting Center at the University of Miami, indicates that the Colonel White-Roosevelt optional attendance area is almost a classic example of segregation practice:

"Q Dr. Foster, with reference, first of all, to the option attendance zones, you described certain effects.

Are there short term as well as long term effects of the ultilization of optional attendance zones?

"A Yes. In the ones we talked about at the high school level, if we can cite the Roosevelt-Colonel White optional zone, and the following Colonel White-Kiser optional zone, the short term effect it seems to me is to allow whites to move out of a school assignment that is becoming black, and I should point out that this is not to say that in many cases that at a certain point blacks also take advantage of this option.

"In the Colonel White-Kiser situation, for example, as Colonel White has become blacker, we are at the point where there are no whites apparently opting now to go to Colonel White."

Further testimony of Dr. Foster demonstrates the deleterious effect that the optional attendance zones had on school integration in Dayton:

"Q In what way do optional attendance areas affect desegregation and the stability of pupil assignment to particular schools?

"A. Well, essentially in my opinion they create instability in the public in one way in terms of housing choices where there are choices and in terms of perception of whether a school is going black or staying white, this sort of thing, so that generally where you have an optional zone which has racial implications, you have an unstable situation that everybody realizes is in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation.

"Q. The optional attendance zones which you have identified in your testimony today, what is your opinion with respect to the effect or if there is any effect on racial composition of schools in Dayton?

"A. Well, in my opinion, these accelerated and precipitated further segregation, and in those cases where I was able to cite hard figures, I think that is very definitely borne out, and I have no reason to believe that in all the other cases the same thing was true although I can't cite actual pupil figures from year to year because they simply aren't available."

We conclude that the District Court correctly found that the optional attendance zones used in Dayton were an element of the cumulative violation of the constitutional rights of the appellants.

(C) Rescission of the Board's Resolutions

The District Judge rendered the following as a finding of fact:

"At the general election in November, 1971, the electors of the school district of Dayton elected three members for a four year term commencing January 1, 1972. Issues

at such election involved the matter of school attendance zones and transportation of pupils. Two incumbent members of the Board ran for reelection, one did not. One incumbent was relected and two new members of the Board were added. On December 8, 1971, the 1971 Board met to consider resolutions dealing with transportation of students and zone attendance lines. All members present were duly elected, qualified and acting members of the Board, although two of them were so-called 'lame ducks,' who would not be members of the Board after December 31, 1971.

"The Board adopted several resolutions. These resolutions recognized the existence of racial segregation in the Dayton schools, the role played by the Board in the creation of the racial patterns and the concommitant responsibility of the Board to eradicate these patterns through affirmative action. The types of affirmative action recognized included the elimination of the old attendance zones and the transportation of students for the purpose of achieving the city-wide racial balance of students. . . .

"Immediately thereafter, one member of the Board who had voted with the majority, requested reconsideration and was improperly ruled out of order. The Board met subsequently on December 6, 1971 [sic], and January 3, 1972. At the end of the latter meeting, the Board ended its term of office and the 1972 Board took its place. On January 3, at its first meeting, the 1972 Board rescinded the resolutions passed on December 8. Since the 1971 Board had passed out of existence, the action of the 1972 Board on January 3, 1972, was not in the nature of a reconsideration but instead was a rescission of the previous action."

From this finding of fact, the District Judge concluded:

"The right of the majority to override protected minority rights has clear limitations in our constitutional democracy. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); also see *Alkire*

v. *Cashman*, — F.Supp. — (S.D. Ohio E.D. 1972). The rescission in early 1972 of the resolutions adopted by the 1971 School Board constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton. See *Bradley* v. *Milliken*, 433 F.2d 897 (C.A. 6 1970); *Oliver* v. *Kalamazoo Board of Education*, 346 F.Supp. 766 (W.D. Mich. S.D. 1971), *aff'd.* 448 F.2d 635 (C.A. 6 1971)."

The passage of the three resolutions and their subsequent rescission by a Board of a different composition are factual matters about which there is no dispute. As hereinbefore stated, the record amply supports the District Judge's findings that racially imbalanced schools and optional attendance zones were elements of the cumulative violation of the appellants' constitutional rights. Accordingly, when the Dayton Board at its December 8, 1971, meeting passed resolutions designed, among other things, to eliminate racial imbalance and optional attendance zones in Dayton schools, it was acting in a manner consistent with its constitutional duties. Therefore, the rescission by a subsequent Board of these resolutions designed to carry out the Board's constitutional duties was an element of the cumulative violation of the appellants' constitutional rights as guaranteed by the Equal Protection Clause of the Constitution.

The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf. *Hunter* v. *Erickson*, 393 U.S. 385 (1960); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution.

In view of our conclusion in this case that the rescission was a part of the cumulative violation of appellants' constitutional rights, we find it unnecessary to pass on the question of whether the rescission by itself was a violation of those rights.

We affirm the District Court's holding that racially imbalanced schools, optional attendance zones, and the Board's rescission of the three resolutions are cumulatively in violation of appellants' rights guaranteed by the Equal Protection Clause.

IV. Other Alleged Constitutional Violations

On appeal, the appellants raise at least four other school practices which purportedly maintained and expanded the basically dual school system inherited at the time of *Brown*. These practices are in the areas of (A) staff assignment, (B) school construction, (C) grade structure and reorganization, and (D) transfers and transportation. The District Judge did not include any of these practices within his finding of cumulative violation of the appellants' constitutional rights.

(A) Staff Assignment

The record reveals that prior to the 1951-52 school year the Dayton Board basically assigned all black teachers only to schools with all black pupils and all white teachers to schools with predominantly white student bodies pursuant to an explicit segregation policy of the Board. In 1951-52, the Board introduced a new policy ostensibly to integrate the faculties, but which effectively continued in practice the racial assignment of faculty through the 1970-71 school year.

In a letter dated March 17, 1969, the Acting Director of the Office of Civil Rights of HEW notified the Dayton Board that "an analysis of the data obtained during the (compliance) review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff."

Other relevant portions of this letter are contained in Section II of this opinion. Following receipt of the letter, the Dayton Board negotiated with HEW and agreed to desegregate its staff so "that each school staff throughout the district will have a racial composition that reflects the total staff of the district as a whole" in accordance with the principles of *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). Thereafter, the Dayton Board realigned its school staffs for the 1970-71 school year.

The appellants admit that progress has been made with respect to eliminating segregative staff assignment, but allege that the agreement with HEW has not been fulfilled in that vestiges of the former practices persist which continue to identify schools as "black schools" or "white schools." As an example, at the high school level, the following table was presented by the appellants to demonstrate how Board assignment of its professional staff still served to identify schools as "black schools" or "white schools" in 1971-72 (w means white, b means black):

	Pupil % Black	*Faculty % Black*	*Principal*	*Coaches*
Belmont	5.2	23.1	w	10w, 2b
Wilbur Wright	9.2	28.5	w	10w, 3b
Kiser	9.8	20.1	w	10w, 2b
Meadowdale	10.6	23.5	w	13w, 3b
Stivers	14.0	32.4	w	10w, 4b
Fairview	24.1	29.8	w	10w, 5b
Col. White	54.6	32.0	w	9w, 6b
Roth	95.8	43.5	b	9w, 7b
Roosevelt	100.0	47.4	b	8w, 8b
Dunbar	100.0	50.3	b	7w, 9b

The witness Dr. Robert L. Green, Dean of the Urban College and Professor of Educational Psychology at Michigan State University, testified as follows:

"Q. Dr. Green, I believe I informed you that the faculties were desegregated as a result of HEW action in 1970.

"Do you have an opinion as to whether or not the effects of this history of faculty assignment persist in terms of identification of schools as black or white in the school district after the changing of the faculties as was done in this case?

"MR. GREER: Objection, your Honor.

"THE COURT: Overruled.

"A. Yes. The answer is yes, Mr. Lucas. When there has been historical practice of placing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentially uni-racial or predominantly black or predominantly white.

"Q. Dr. Green, you did examine the '68-'69 statistics for the Dayton School System, is that correct?

"A. Yes.

"Q. And did you in examining the data note any correlation between the pupil composition of black or white and the faculty composition black or white?

"A. Yes, I did, Mr. Lucas.

"Q. Do you have an opinion whether this is isolated instances of correlation or is there any systematic pattern to it?

"A. There seems to be a systematic pattern as it relates to black teachers and the racial composition of schools vis-a-vis black youngsters and white youngsters being essentially placed in schools that are predominantly white."

The witness Dr. Foster testified as follows:

"Q. . . . In light of that history, could you give us your opinion as to the effect, first of all, of that policy before the change, in terms of identification of schools as black or white and the effects of that change on the present situation in the Dayton School System?

"MR. GREER: Objection.

"THE COURT: Overruled.

"A. Well, my opinion is that this policy and practice before the change we assume took place, especially since it is in a northern district, would indicate that the Board is missing or has missed a golden opportunity to prove that it does want to run a unitary system and remove segregation practices insofar as it is able, because the Board clearly, as I understand it, under most State laws, or all State laws, can assign teachers willy-nilly in the System wherever they want to. This is not a free choice matter.

"Q. Is it also an annual option that the school Board has?

"A. Yes, in terms of assignment. In terms of my opinion on what this does, as recently changed, assuming this, I would have to say that this does not remove by any means the vestages of a segregated system since it is only one component of several important aspects of a system segregated or desegregated. I think it is a very important component, and I think it is a step certainly in the direction of desegregation, and a very positive step.

"But coupled with the other most important step of pupil assignment, so long as the schools themselves remain segregated, as they certainly do at this time in my opinion in Dayton, then the fact that teachers or staff being desegregated, if we assume that doesn't carry near the weight it would if the total desegregation process had taken place."

Dr. Wayne M. Carle, Superintendent of Schools in Dayton at the time of the trial, testified as follows:

"BY MR. LUCAS:

"Q. Would you answer my preliminary question, then. Did you agree with the HEW conclusion that there was purposeful faculty and staff segregation in the Dayton School System?

"MR. GREER: We would object to this, your Honor, as it simply asks a self-serving conclusion of the witness.

"THE COURT: I am going to overrule your objection. You may answer.

"A. There is no question but what that was so.

BY MR. LUCAS:

"Q. Now, Doctor, I think you stated that there had been substantial faculty desegregation. Has there also been staff desegregation and, if you will, limit it to what you have defined as line personnel, principals, assistant principals?

"A. There has been considerable desegregation of administrative staff, but there still is a high correlation between the race of pupils and the race of the administrator.

* * *

"Now, today the percentage of black administrators is around 32 or 33 percent, as I recall. That indicates less discrimination in promotion, since there is more relationship between the percentage of teachers, which now is perhaps 34 or 35 percent, and administrators. But I am saying that with respect to their assignment, and particularly at the high school level, there is an almost perfect correlation between the race of the principal and the predominating race in the school. All four black high schools, for example, have black principals. All the other high schools have white principals. So that that considerable vestige of segregation still has not been eliminated. There would be other instances, if you just scan the statistics, in which previously all black or nearly black staff similarly have weighted errors in them, that

is, the error is still in the direction of the previous discrimination. If the staff previously were 70 percent and now should be, let's say, 30 percent black, it may still be 40 percent because of difficult factors in resolving it.

"In all cases, or probably in all cases, that error or that difference is still weighted to the previously fully segregated pattern, so that it is very difficult I think, to understand the depth of segregation. It is so pervasive that its vestiges are difficult. These are two areas in which that is very obvious."

(B) School Construction

The District Judge did not include the Dayton Board's school construction practices within the cumulative violation because he found the underlying motives behind such construction to be racially neutral, rendering the following as a finding of fact:

"(c) Site selection and construction

"(9) Since 1954 the school board of Dayton has constructed 14 new elementary schools and 69 elementary school additions. The construction follows the pattern of growth in the Dayton area and follows the specific policy of 'building schools where children are, or where they are expected to be.' New construction of elementary schools are largely on the periphery of the center city. There are instances of errors in Board planning in that some areas have not developed as expected and other developed areas have not become part of the Dayton School District, as expected. There are examples of schools operating substantially below capacity. While reasonable minds might reasonably differ on selection and construction of some schools, sufficient evidence has not been presented that school construction was segregative in nature other than to provide schools in white neighborhods which remain predominately white and schools in black neighborhoods which remain predominately black.

"(10) Five new high schools and fourteen high school additions have been constructed in the past eighteen years. Construction of some high schools followed the pattern of construction of elementary schools in that sites selected were away from the center of the city and in neighborhoods which were predominately white. Other sites could have been selected near the center of the city in black neighborhoods. Such schools would arguably, at least, have had a larger proportion of whites attending such schools.

"Site selection is a matter of judgment and no evidence has been presented that the Board of Education failed to use neutral criteria in its choices. In the construction of schools, the Board, over the years, has been presented with options. Plaintiffs have failed to sustain their burden of showing that the defendant Board exercised those options presented in an improper fashion."

On appeal, the appellants contend that there is substantial evidence in the record to support their claim that the Dayton Board's practices in schoool construction had a segregative effect and contributed substantially to the alleged present duality in pupil assignment. The record reveals that in the period of greatest expansion of the Dayton school system, from the late 1940's to the mid 1960's, the great majority of new schools and additions were located by the Board in either virtually all black or all white areas. Of 24 new schools constructed between 1950 and the present, 22 opened 90 per cent or more black or white. The following table contains some examples:

High Schools	*Date of Opening*	*% Black at Opening*	*% Black Pupils 1972-1973*
Patterson	1954	0.0	32.9
Belmont	1956	0.0	5.2
Meadowdale	1960	0.0	10.6
Dunbar	1962	92.3	100.0

Elementary Schools			
Orville Wright	1952	0.0	8.1
Miami Chapel	1953	100.0	99.8
Horace Mann	1954	0.0	3.1
Bell Haven	1954	0.0	17.1
Hickorydale	1957	0.0	32.5
Meadowdale Elem.	1957	0.0	12.6
Louise Troy (Primary)	1957	100.0	99.1
Shoup Mill	1958	0.0	3.8
Carlson	1958	95.0	99.0
Jackson Primary	1960	99.9	99.7
McNary Park (Primary)	1964	100.0	100.0
Res. Park (Primary)	1966	96.5	100.0
Valerie	1966	0.0	24.0

On the issue of school construction practices, Dr. Foster testified as follows:

"Q. Dr. Foster, would you at this point tell me if you made an inquiry into the question which I think related to the construction issues of site selection?

"A. Yes.

"Q. And what was that inquiry?

"A. In terms of the use of site selections to maintain segregation, in the new construction sites from 1950 which we have already discussed to the present, many of these have helped to promote and to impact and lock in segregated or isolated situations either in the inner city or in the suburbs, and I think this is true in terms of both school segregation and housing segregation, that is, in terms of its effects. First of all, in the area of the white suburban expansions which are farthest from the center of the city which is all black, and these were, of course, more inaccessible at the time of construction than they are now. We have Valerie which was built in 1966 which is almost at the extreme north of the district. We have Meadowdale High School built in 1960 and Meadowdale Elementary built in 1957 to the north of

the district. We have Shoup Mill built in 1958 and to the nearly extreme north. The south and east of the furthest white suburban expansion, we have Eastmont, on the extreme east built in 1965. We have Wilbur Wright to the northeast built in 1952, Horace Mann to the southeast built in 1954, and Belmont High School in the southeast built in 1956.

"Now, contrary-wise, in the inner city during this time there were a couple of examples of schools which were built into locked-in situations in terms of segregation, and in fact these schools were surrounded by other schools which were all black. That would be McNary in 1964 and Jackson Primary in 1960.

"Q. Dr. Foster, in your experience, use of the primary unit in close proximity to elementary schools, has this been a matter reflective of segregation practices in your experience?

"A. Yes. It is in a sense very much nothing more than an addition. They are on the same campus and for all practical purposes they are really one school.

"Q. What effect does this have on the existing racial concentrations?

"A. Well, it tends to secure it and to further insure that those schools are going to remain segregated and that the system as a whole is going to remain segregated."

Based on this evidence, the appellants dispute the District Court's conclusion that the Dayton Board's school construction practices were not a part of the cumulative violation. The appellants contend that on facts similar to those presented in this case the Supreme Court in *Swann, supra,* 402 U.S. at 20-21, found major constitutional violations on which a District Court could fashion a remedy.

(C) Grade Structure and Reorganization

The appellants' primary objection in this area is to the establishment of a middle school system in the 1971-72 school

year which allegedly had a segregative effect. Dr. Foster testified as follows:

> "My conclusion is that the establishment of the middle schools in 1971 resulted in the establishment of four out of five schools that were clearly racially identifiable, therefore, increasing or maintaining segregation as opposed to availing the opportunity of decreasing it."

Further, after the establishment of the new middle school structure, the Ohio State Department of Education gave the following advice to Dayton school authorities:

> "If what appears to be happening with middle schools is in fact happening, then Dayton has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to school children. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur."

The District Court found that the boundaries established for the middle schools in September 1971 had "neither segregative nor integrative effect." The appellants submit that this finding means, under applicable legal standards, that the Board acted unconstitutionally to maintain segregation in the face of an opportunity to accomplish substantial desegregation. The appellants assert that the action of the Dayton Board was intentional because the Board was aware of desegregation alternatives but instead choose a plan whose predictable impact was not to further integrate the Dayton school system.

(D) Transfers and Transportation

Finally, the appellants contend that transfer and transportation practices of the Dayton Board, which might have held promise to accomplish further desegregation, have operated to maintain segregation and further earmark schools as "black"

or "white." In support of this contention, the appellants cite evidence that curriculum, hardship and disciplinary transfers have operated frequently to assign white children from "black schools" to "writer schools" and black children from "white schools" to "blacker schools." Further, there is evidence in the record revealing that the Board assigned tuition pupils from outside the district on a dual basis; white pupils were assigned to white schools and black pupils were assigned to black schools.

The testimony of John Harewood, Assistant Superintendent of Dayton schools in charge of administration, reveals two instances in which children were bused "intact" with the effect of segregating children on a racial basis in separate classrooms within schools. In 1963, white children from Ruskin School were transported intact to separate classes in the mixed Central School. In the spring of 1968, some of the black children from Edison School, which had been partially destroyed by fire, were similarly segregated within a number of white schools throughout the city.

The District Court's only conclusion in the area of transfer and transportation practices was with regard to the school system's Freedom of Enrollment program. The District Court required that program be revised for Dayton high schools so that transfers for purpose of improving racial balance take precedence over curriculum transfers.

On the basis of the evidence adduced, the appellants' legal argument in this area is that the transfer and transportation practices of the Dayton Board had the "clear effect of earmarking schools according to their racial composition" which is proscribed by *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 202 (1973).

(E) Conclusion as to Other Alleged Constitutional Violations

As hereinabove indicated in Section IV of this opinion, the appellants have raised serious questions with respect to whether the District Judge's failure to include these four school practices within the cumulative violation was supported by substantial evidence. In view of our holding in Section V hereof, we conclude that it is unnecessary at this stage to pass on whether the District Judge's findings of fact with respect to these four school practices is supported by substantial evidence.

V. Remedy

As more fully described in Section I hereof, the District Court ordered the Dayton Board of Education to submit a desegregation plan that conformed to all requirements of law. Subsequently, the four-member majority of the Dayton Board submitted an eleven point plan characterized by the appellants as a "free choice plan." Other plans were submitted to the District Court by the three-member minority of the Dayton Board and Dayton Classroom Teachers' Association. Without holding a hearing on the remedy issue, the District Court approved the plan of the Dayton Board majority with one modification.

The appellants' primary contention on appeal is that the desegregation plan approved by the District Court is inadequate to remedy the cumulative violation found by the District Court. We agree.

On receipt of the Board majority plan, the District Court was obliged "to assess the effectiveness of . . . [the] proposed plan in achieving desegregation . . . . in light of the circumstances present and the options available in each instance." *Green* v. *County School Board*, 391 U.S. 430, 439 (1968). The appellants assert that the circumstances present here, namely a cumulative violation, required a remedy of "all-out desegregation." *Keyes, supra*, 413 U.S. at 214. The appellants further assert that the plan of the Board minority would accomplish such "all-out desegregation" and that therefore we should remand this case to the District Court with instructions that it order the plan of the Board minority implemented.

Today we simply hold that the remedy ordered by the District Court is inadequate, considering the scope of the cumulative violations. The case is remanded to the District Court for proceedings to formulate a desegregation plan for the Dayton school system consistent with the remedial guidelines outlined in *Keyes, supra,* and *Swann, supra.* This holding does not necessarily require the District Court to implement the plan of the Board minority, but "all vestiges of state-imposed segregation," *Swann, supra,* 402 U.S. at 15, must be eliminated.

In formulating a desgregation plan, the District Court of course will adhere also to the guidelines enunciated by the Supreme Court in *Milliken* v. *Bradley,* —— U.S. —— (No. 73-434, July 26, 1974), reversing *Bradley* v. *Milliken,* 484 F. 2d 215 (6th Cir. *in banc* 1973).

Once the plaintiffs-appellants have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" *Keyes, supra,* 413 U.S. at 200. When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school segregation are inadequate. *Id.* at 210-13.

VI. Other Directions on Remand

In its Supplemental Order on Remedy, dated July 13, 1973, the District Court suggested that its disposition of the case appeared "to require the dismissal of those non-Dayton defendants." We disagree with this suggestion as to the State defendants.

The District Court is directed to keep the State defendants as parties to this action. Although, according to the District Court order of procedure, evidence as to a state violation was supposed to be excluded from the initial trial, the following evidence was adduced: The Dayton school district is chartered by the Ohio State Department of Education, and without such a charter, the district would be without power to operate and could not receive state aid. Ohio Revised Code, §§ 3301.16 and 3317.01. Since an Ohio Attorney General's opinion dated July 9, 1956, the State Department of Education has known that it has an affirmative duty under both Ohio and federal law to tak all actions necessary, including, but not limited to, the withholding of state and federal funds, to prevent and eliminate racial segregation in the public schools. Finally, during the years in question in this case, the Dayton school district was denied any allocation of state funds for pupil transportation, although such funds were made available to most suburban and rural school districts in the state.

VII. Other Issues

Several other issues were presented which do not now require discussion. All contentions of the parties contrary to the conclusions reached in this opinion have been carefully considered and are found to be without merit.

VIII. Conclusion

The District Court's holding of a cumulative violation of the appellants' constitutional rights, as contained in its Findings of Fact and Memorandum Opinion of Law dated February 7, 1973, is affirmed.

Since we conclude that the remedy prescribed by the District Court is inadequate, the case is remanded to the District Court with directions to revise and supplement its order of July 13, 1973, entitled "Supplemental Order on Remedy," so as to formulate, in accordance with the guidelines hereinabove set forth, a desegregation plan for the Dayton school system and for other proceedings to that end not inconsistent with this opinion.

D. JANUARY 7, 1975 ORDER OF DISTRICT COURT RELATING TO SUBMISSION OF PLAN

(Filed January 7, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

ORDER

This matter comes before the Court pursuant to remand by the United States Court of Appeals for the Sixth Circuit and following informal conferences called by the Court limited to one attorney for the plaintiffs and one attorney for the defendants. The Court would be remiss if it did not recognize the contributions of plaintiffs' attorney, Louis Lucas, and defendants' attorney, David Greer, whose research, counsel and suggestions materially assisted the Court in the preliminary phase of this matter.

Based upon such conferences, the controlling decisions in this Circuit, and the state of the law on the subject as announced by the Supreme Court of the United States, the Court concludes that it is now appropriate to deal with

specific plans. The parties, including the plaintiffs, the defendant Board of Education of Dayton, and the Board of Education for the State of Ohio will confer and prepare plans either jointly or separately for submission to this Court which will accomplish the following ends and satisfy the requirements set forth in the opinion of the United States Court of Appeals for the Sixth Circuit, 503 F.2d 684 (1974).

In the twenty years that have elapsed since *Brown* v. *Board of Education*, 347 U.S. 483 (1954), large numbers of American cities have faced the problem that now confronts Dayton and have adopted varying methods to solve it. Able, conscientious, and knowledgeable experts in this field have developed. Departments of government, both state and national, are anxious to assist. The experience of other cities and the available experts should be consulted by the parties in the ultimate solution of this problem. Such devices as "pairing" of schools, "clustering" of schools, alterations of attendance boundaries, "magnet" schools, feeder patterns, increasing school capacity, new construction and voluntary transfers, should all be considered. No known desegregation device should be overlooked. The proposals of the Board of Education, both those presented in response to this Court's Order of February, 1973, and those suggested in the informal discussions above referred to should not be abandoned. The thought and planning that preceded these proposals should not be ignored. These proposals have not been considered unresponsive; they have been considered insufficient. They do represent a base for further expansion.

The Court draws particular attention to the proposal of the Dayton School Board to construct magnet schools in the downtown area. It may well be that further development of this concept might achieve the desired goals as to high schools on a voluntary basis.

The Dayton freedom of enrollment program should not be abandoned. It, too, may contribute in great measure to a solution of the problem.

Deliberately absent from the foregoing suggestions is that of transporting students to accomplish racial balance. It does

not require much wisdom or foresight to recognize that this coercive solution is the least satisfactory. The Court will consider transportation of students only as a last resort and only after careful inquiry has established that no other solution exists.

One word of admonition: This is not a problem that will disappear by itself. It is concerned with basic constitutional rights that every public official, including this Court, is sworn to uphold.

In February of 1973, this Court observed that no peaceful community could long exist where two separate societies viewed each other from ever higher walls of suspicion and distrust. The tragic events of the past three months in the city of Boston, Massachusetts, have confirmed this observation with distributing consequences.

With full respect for the Board's knowledge and ability; with full recognition of its representative responsibilities; and with full faith in its dedication and good will, the Court now requests the Board of Education to report upon the months of study and planning that have been completed as they relate to a solution of the problem herein.

The Board of Education will submit its plan to the Court on or before February 1, 1975. A completed plan will be made available for public inspection on or before January 20, 1975. Should it appear necessary, hearings on such plan and any other submitted by interested parties will be held on or before February 15, 1975.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

E. MARCH 10, 1975 ORDER OF DISTRICT COURT ADOPTING PLAN OF DAYTON BOARD OF EDUCATION

(Filed March 10, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

ORDER

This matter is before the Court pursuant to remand by the United States Court of Appeals for the Sixth Circuit. In accordance therewith this Court on January 7, 1975, directed the School Board of the City of Dayton to submit a plan of desegregation by February 1, 1975 consistent with such Order of Remand. Subsequently, plaintiffs also filed a plan and a hearing on both was held February 17, 19, and 20, 1975.

I. Basis of Court's Consideration

In order to place this Court's consideration of any remedial plan in a proper context certain introductory observations should be made:

1. All desegregation efforts must be tested initially against the principle that separate facilities limited to blacks and whites are forbidden;[1]

2. Racial balance, i.e., a reflection of the district percentages in each school is not a Constitutional right equivalent to the principle above enunciated;[2]

3. It is not the function of district courts to operate public school systems, to determine social values, or to engage in restructuring of communities, personal attitudes, or sociological benefits, except as these matters may bear upon Constitutional rights.[3]

To the foregoing the court would add the following which

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[1] "In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"; Brown v. Board of Education, 347 U.S. 483 (1954) (Brown 1).

[2] *Swann v. Board of Education,* 402 U.S. at page 24:

"If we were to read the holding of the District Judge to require as a matter of substantive Constitutional rights any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

See also: Milliken v. Bradley, —— U.S. —— (1974), 94 S.Ct. 3112 at p. 3125.

"The failure of an educational agency to attain a balance on the basis of race, color, or sex or national origin of students among its schools shall not constitute a denial of equal educational opportunity or equal protection of laws." 20 U.S.C. § 1704.

[3] "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorties; absent a finding of a Constitutional violaton, however, that would not be within the authority of a federal court." Swann v. Board of Education, supra.

may be deemed findings of fact whether implicit in or explicated by previous opinions of this Court.

1. The State of Ohio does not now, nor has it since 1887 mandated a dual system of public education. To the contrary, 84 Ohio Law 34, dated February 22, 1887, specifically required a unitary public school system.

2. The defendant School Board of the City of Dayton had engaged in activities which were segregative in effect and which did impinge upon the Constitutional rights of students in such system. At no time, however, did defendant maintain a dual system of education.

3. Overt evidences of such segregative activities have been eliminated both by action of the Board of Education and by previous Order of this Court but the effect thereof may not.

II. Duty of District Courts

With the determination that acts of segregation did occur it is now necessary to examine the duty imposed upon this Court under such circumstances. While there is a variation in the description of such duty, this Court elects to be guided in this matter by the following: "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education,* (Brown II), 349 U.S. 294.

There is, however, a final admonition in *Swann* that bears careful attention: "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Board of Education, supra* at p. 16.[4]

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[4] A subsequent determination by the Supreme Court of the United States in *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973) holds there is broad discretionary power granted to trial courts in shaping equity decrees. Lemon, it should be pointed out, is not a school desegregation case.

Two events that bear upon the scope of appropriate remedy have occurred since August 20, 1974, the date of the appellate holding in this case. These events may well have changed both "the nature of the violation" and the "scope of the remedy." They require further discussion.

First: Effective October 20, 1974, the Congress of the United States adopted the Equal Educational Opportunities Act, 20 U.S.C. § 1701 *et seq.*[5]

Section 1701 declares it to be the policy of the United States that:

"1. All children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

2. The neighborhood is the appropriate basis for determining public school assignment."

Section 1712 imposes a limitation upon courts in the following language: "In formulating a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct *particular denials of equal educational opportunity or equal protection of the laws.* [Emphasis added]

In § 1713 is listed a priority of remedies and in § 1714 there is a specific limitation which holds: "No court . . . shall pursuant to § 1713 of this Title order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such students."

Second: On December 6, 1974, the United States Court of Appeals for the Sixth Circuit decided *George and Carolyn Higgins* v. *Board of Education of the City of Grand Rapids,* (No. 73-2189), —— F.2d —— (1974). The Court in *Higgins*

[5] The effective date of the above act is said to be, "On and after the sixtieth day after August 21, 1974."

followed *Deal* v. *City of Cincinnati Board of Education,* 369 F.2d 55, *cert. denied* 389 U.S. 847, in these words: "*Deal* [upheld] the constitutionality of retaining neighborhood schools where racial imbalance has not been caused by any discrimination on the part of school officials."[6]

If the nature of the violation determines the scope of the remedy, it becomes critical to determine whether or not there is an unremedied district-wide segregative act. This Court found in its Order of July 13, that specific segregative acts, since eliminated; the existence of optional attendance zones, now eliminated; and conditions of racially imbalanced schools together required action by the federal courts.

We do not deal with a mandated dual school system; we do not deal with actions taken on a school-by-school basis.[7] We do deal with a system that has in the past permitted segregative practices to exist. The issue, therefore, is whether a plan intended to improve the educational opportunities for all students without a school-by-school restructuring basis is appropriate. This Court holds at this time that it is.

III. Plaintiffs' Plan

The plaintiffs have urged upon this Court a plan which will assign students among the Dayton schools in a black/white

[6] *Higgins* mentions *Brinkman* v. *Gilligan* on page 19. This Court respectfully suggests that the following sentence contained therein: "These three findings were held in their cumulative effect to be enough to reflect *de jure* segregation.", requires for full significance an examination of the specific holding of the court. See footnote 7 *infra.*

[7] The only district-wide action of the defendants involved the rescission of resolutions in January of 1970. The United States Court of Appeals dealt with the issue as follows:

"We hold that the findings of fact upon which the District Court based its conclusion of accumulative violations are not clearly erroneous but to the contrary are amply supported by the evidence. Fed. R. Civ. P. 52A. However, we do not pass upon the question at the present time as to whether the rescission of the Board resolutions in and of itself constituted an independent violation of the Constitution. *Brinkman* v. *Gilligan,* 503 F.2d 684 at 693.

ratio approximating the district-wide ratio for such schools with a variation of 15%, plus or minus, from the mean.[8] To accomplish this, the plaintiffs would create "clusters" of elementary schools, additional middle schools, and redistricted high schools. The term "cluster" is taken to mean a group of schools, usually more than two, within a common attendance district to which students will be sent irrespective of proximity to their place of residence.[9] Plaintiffs' plan is a comprehensive one; it was carefully prepared and well-presented. It will do what the plaintiffs urge must be done. It is not intended to, nor will it, in and of itself, provide alternate educational programs or seek innovative learning experiences. In the plaintiffs' view, these are obligations of any school board irrespective of the integration or segregation of the schools. Since this question is not before the Court, it will not be ruled upon.

In the Order of Remand by the United States Court of Appeals for the Sixth Circuit, the following appears:

"In formulating a desegregation plan, the District Court, of course, will adhere also to the guidelines enunciated by the Supreme Court in *Milliken* v. *Bradley*, —— U.S. ——, 94 S.Ct. 3112 (1974)."

The majority opinion by Chief Justice Burger includes the following: "Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the primary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable. Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated — in

[8] According to the testimony the appropriate percentages of Black students for the year 1974-1975 are:

Elementary Schools	44.2%
Middle Schools	68.7%
High Schools	45.5%

[9] Portions of the record dealing with this transportation are included herein as Appendix A.

their view of what constituted desegregation — unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole. . . . In *Swann* which arose in the context of a single independent school district the Court held, 'If we were to read the holding of the District Court to require as a matter of substantive Constitutional rights any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse; 402 U.S. at 24.

The clear import of this language from *Swann* is that desegregation in the sense of dismanteling a dal school system does not require any particular racial balance in 'each school, grade or classroom.'" 94 S.Ct. at 3125.

It would seem, therefore, that whether the area in question is a single school district as in *Swann* or in multi-school districts as in *Milliken*, the obligation does not exist to create racial balance which is in essence the sole function of the plaintiffs' plan.

Accordingly, this Court holds that a comprehensive plan, such as plaintiffs suggest, is not required at this time. We hold also that plaintiffs' plan as presented is violative of the Equal Educational Opportunities Act, 20 U.S.C. § 1701, *et seq.*, and particularly §§ 1713 and 1714.

IV. The Defendant's Plan

The defendant's plan was presented to the Court in a 17 page memorandum with a 26 page exhibit of tables and statistics and a 69 page appendix. It also contains much extraneous material. Only the "magnet" program and the "learning centers" concept require comment.

A magnet high school[10] with programs not offered at home high schools and "satellite" magnet programs intended to attract students from their high schools and districts of resi-

[10] The term "magnet high school" is deemed to mean a school open to all students with programs sufficiently attractive that students will elect to attend. The Stivers-Patterson vocational complex is one example of a magnet school.

dence is proposed. If successful, the magnet program will provide an opportunity to students, both black and white, to obtain additional educational advantages equally attractive to both. Magnet schools are an acceptable desegregation device. 20 U.S.C. § 1713(f).

The magnet's schools are supplemented by "learning centers" for foreign languages and business education for 6th, 7th, and 8th grades; career motivation for 4th and 5th grades; science for 5th, 6th, 7th and 8th grades; and a science environmental center for the 6th grade.

Learning centers to which students are transported are integrative in concept. Plaintiffs assert that such transportation is also violative of 20 U.S.C. §§ 1713 and 1714 since it would require bussing of students to schools other than the school closest or next closest to his or her place of residence. We leave this argument for another day and another court. We hold only that the plan comports with the Congressional declaration of policy set forth in 20 U.S.C. § 1701.

The overall plan is desegrative in intent; it is not violative of *Brown* v. *Board of Education*, *supra*, and it does not appear to violate the mandate of the United States Court of Appeals for the Sixth Circuit so long as the following limitations are observed:

1. All programs including the magnet schools and the learning centers must be so located that the burden of transportation is substantially equal upon both black and white students;

2. The composition of all classes must be no less than the mean for the appropriate schools plus or minus 15%;[11]

3. The faculty assigned to all programs must reflect the racial percentages of faculty within the system as a whole;

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[11] See Footnote 9.

4. The amount of time of student assignment to classes in learning centers shall not be less than 20% of such student's total instructional time.

It is entirely possible that the proposed program will not attract an appropriate number of black and white students and might instead further segregate the Dayton school system. Because it is innovative, because it offers the opportunity for alternative quality education, and because it has been proposed by a board of popularly elected officials, the Plan should be given a fair trial. The Board's plan will be accepted provisionally for the school year 1975 — 1976. The provisional acceptance requires this Court once more to continue jurisdiction of this matter.

There is an omission in the comprehensive plan submitted by the defendants. It is not possible to determine whether the numerous desegregative techniques set forth in this Court's Order of January 7, 1975, have been fully investigated. It is not known, for example, whether adjustments of existing school attendance zones would reduce concentrations of black and white attendance. It is not known whether feasible pairing or clustering of schools could be accomplished without bussing violative of the Equal Educational Opportunities Act.

Accordingly, the defendants are directed to conduct such a study and to report to this Court on or before October 1, 1975, of the results thereof on a school-by-school basis. Further hearings will thereupon be held and an alternative plan consistent with the Equal Educational Opportunities Act will be established on or before January 1, 1976.

In the event defendants are unable by the methods approved in July of 1973 and those approved by this Order to accomplish what this Court deems to be adequate progress in complying with the Equal Educational Opportunities Act and the mandate of the United States Court of Appeals for the Sixth Circuit, such alternative plan will become effective for the school year beginning in September, 1976, and for all school years thereafter.

V. The Dayton School Board

The willingness of this Court to accept defendant's plan at this time is dictated in part by the attitude of the School Board in the City of Dayton. This Court has not been faced with the problems of Judge James B. McMillan who dealt with a recalcitrant school board in *Swann* v. *Charlotte Mecklenburg Board of Education, supra,* nor with those of Judge W. Arthur Garrity, Jr., who has dealt with a contumacious school board in Boston. Any reasonable plan submitted by a board which has demonstrated good faith is entitled in the first instance to careful consideration by a court and in cases of doubt to have such doubt resolved in its favor. Good faith is a two-way street.

VI. Progress of the Case

The pace at which desegregation cases proceed through the courts has been a source of concern by courts and a source of frustration for litigants.[12] It has frequently been observed that over 21 years has elapsed since *Brown* v. *Board of Education, supra,* and the problem appears far from solved. It can even be asserted that the magnitude of the problem has in fact increased in that time. To postpone yet again the ultimate determination of this matter may appear to the plaintiffs to be a further delay of their rights. A chronology of the significant

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[12] The complexities of school desegregation have resulted in the following instances of prolonged litigation:

a. *Goss* v. *Board of Education of the City of Knoxville, Tennessee,* original District Court opinion, 186 F.Supp. 559 (1960), recent opinion of United States Court of Appeals for the Sixth Circuit, 444 F.2d 632 (1971);

b. *Kelly* v. *Board of Education of the City of Nashville* (subsequently Metropolitan County Board of Education of Nashville), original District Court opinion, 139 F.Supp. 578 (1956), recent opinion of the United States Court of Appeals for the Sixth Circuit, 463 F.2d 732 (1972).

c. "These appeals represent another installment of an already lengthy serial: 'The desegregation of the Memphis Public School System'. The initial chapter of this story was written in 1960 . . ." *Northcross* v. *Board of Education of Memphis City Schools,* 466 F.2d 890 (1972).

dates in this proceeding might held to place the matter in its proper context.

This case was filed in May of 1972. It was heard on the merits in November of 1972.

A Findings of Fact and Memorandum Opinion of Law was filed in February of 1973. An Order imposing integrative remedies upon defendants was filed in July of 1973. During the school year 1973 — 1974 and 1974 — 1975 these remedies were in effect.

The Order of Remand by the United States Court of Appeals for the Sixth Circuit became effective in October of 1974. The Order herein will at the minimum be effective for the school year 1975 — 1976.

While this is hardly a model of speed and dispatch, it is consistent with the magnitude of the problem that must be solved. In the mass of rhetoric, emotional outbursts, and demogoguery that have attended the progression of many school desegregation cases, a few voices have been heard to suggest a rule of moderation. One such by Senior Judge Clifford O'Sullivan of the United States Court of Appeals for the Sixth Circuit bears repetition:

> "The hope or dream that one day we will have become a people without any motivation borne of our differing racial beginnings will have a better chance of fulfillment if patience accompanies our endeavors. Strident and truculent judicial commands could indeed exacerbate what now remains of racial bias and prejudice."
> *Goss* v. *Board of Education of the City of Knoxville, Tennessee,* 444 F.2d 632 at 640.

VII. Conclusion

In view of the foregoing, the Court holds as follows:

1. The plan of the defendants as modified herein will have an integrative effect upon the Dayton school system and is provisionally adopted for the school year 1975 — 1976.

2. The plan of the plaintiffs is violative of The Equal Educational Opportunities Act, 20 U.S.C. § 1701, et seq., and imposes a burden upon the defendant school board beyond that which it is presently required to bear.

3. The state of the law in desegregation cases, the Order of Remand in this case, and the Congressional intent in the Equal Educational Opportunities Act, supra, do not require the adoption of a mathematical ratio plan wherein each school, grade or classroom of the district shall contain any particular balance of black and white students representative of the district as a whole.

4. Where the previous actions of a school board indicate only a difference of opinion on a subject concerning which reasonable minds may reasonably differ, bad faith will not be presumed and a proposal, although novel and untried, will be given an opportunity for success.

5. In view of the developments, subsequent to August 20, 1974, the Court is of the opinion that holdings herein regarding the Equal Educational Opportunities Act involve a controlling question of law as to which there is substantial grounds for difference of opinion and an immediate appeal from this Order may materially advance the ultimate termination of the litigation. Accordingly, the Court does so certify in accordance with 28 U.S.C. § 1292(4)(b). An application for appeal in accordance with this determination shall not stay the proceedings in this Court.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX A TO MARCH 10, 1975 ORDER

. . . after this matter was raised during the Louisville argument in the Sixth Circuit, and the Court's inquiry was whether or not the Act of Congress could overcome the constitutional provisions which were being enforced by the courts, and I think I had related that to the witness. I am not sure, but I was present when the Sixth Circuit asked that question, and that conformed with my earlier reading of the Broomfield Amendments which had a similar purpose but, however, had the same saving clause about the power of the courts is not impaired where necessary to remedy a constitution violation.

THE COURT: Well, we are not going to debate the constitutionality of an Act of Congress. I am concerned with the presentation of a plan where it is somewhat peripheral as to the consideration of this Act.

Mr. Greer, you may continue.

CONTINUATION OF CROSS EXAMINATION

BY MR. GREER:

Q. Yesterday, Doctor Foster, we discussed the schools that were left unaffected by your pairing and clustering at the elementary level, and the two examples of the contiguous pairing in your plan. Let's move on to the other nine clusters that comprise your elementary school plan. Each of those nine clusters involve a substantial amount of required bussing of school children to schools beyond those that are closest or next closest to their place of residence; isn't that correct?

A. I believe that is correct, yes.

Q. Let's look, for example, at cluster F of your group. A child in the Lewton school district which is in the eastern part of Dayton is required to spend grades 4 and 5 in Edison school which is on the west side of Dayton; is that not right?

A. That's right.

Q. And am I not also correct that the following schools are closer to the Lewton district: Eastmont, Grant which you are converting to a middle school —

A. Would you hold that just a minute so I can make a note of those?

Q. Sure.

A. All right. Between Lewton and Edison you are speaking of?

Q. That's correct.

A. And what are the schools again?

Q. Well, let me just list them off It would be Eastmont, Kemp, Washington which in your original plan you were going to close, Franklin, Cleveland, Belmont, Horace Mann and then another school that you are planning to turn into a middle school which is Ruskin, Huffman, Webster, Emerson, Patterson, McGuffey, Hawthorne which is your original plan was going to be closed, Irving and Whittier.

A. Well, if you are talking about a direct line between the two schools, you couldn't possibly get all those schools in between the two you are speaking of.

Q. My question wasn't phrased in terms of the way the crow flies. It is whatever schools are closer to the residence of a child living in the Lewton district, and all of those schools would be closer to that child's residence; isn't that true?

A. You mean as the crow flies?

Q. Let's get a lame crow and say going in any direction. Let's make an arc just so we know the distance of what is closer to a child living in the Lewton district.

A. It would say it generally might be true, but to say it was true, I would want to go to the map.

THE COURT: Why don't you do that, Doctor.

THE WITNESS: How many schools did you name altogether?

BY MR. GREER:

Q. Eighteen different schools.

A. All right.

Q. And the same type of situation, of course, would be true in that cluster with respect to students living in the Edison district who would be going over to the east end of Dayton in grades 1 through 3; isn't that true?

A. Yes.

Q. If we turn to cluster C, a child in the first or second grade at Eastmont would be required to be bussed beyond some seventeen or eighteen closer schools in order to attend classes at Highview; isn't that correct?

A. Yes.

Q. And vice versa the same kind of situation would be true for a child living in the Highview district during grades 3 to 5?

A. Yes.

Q. If we look on cluster I, the required bussing between Cardendale and Shiloh passes by ten school zones which are closer to the residences of the children in those two affected school districts; isn't that right?

A. Without counting them, I would believe that is probably accurate, yes.

Q. And without going through the tedium of each of these clusters, isn't it true that the same kind of cross-town required bussing affects students in 24 out of the 28 school zones that are paired or grouped in clusters under your proposal?

A. Again without counting, I would believe that would probably be accurate, yes.

Q. And you have before you the statistics, of course, as to the number of children enrolled in these various schools, don't you?

A. Yes.

Q. Am I not correct in each year something in the area of 9,000 students under your plan would be bussed beyond the second closest school to their place of residence?

A. Pardon me just a second.

Well. I don't get quite that many. At a quick count, I get something like 7,000.

Q. Does that comprise all of the students in these 24 out of 28 school Zones?

A. It would comprise the students in the clusters that you referred to, and our count should be the same because my counts were the same as your staff person that testified about students being bussed in the clusters.

Q. Right. What you just computed for me has been the nine out of the eleven clusters that we started talking about today?

A. That's correct.

F. JUNE 24, 1975 OPINION OF COURT OF APPEALS

(Filed June 24, 1975)

No. 75-1410

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK BRINKMAN, ET AL., *Plaintiffs-Appellants,* v. JOHN J. GILLIGAN, ET AL., *Defendants-Appellees.*	APPEAL from the United States District Court for the Southern District of Ohio.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PHILLIPS, Chief Judge. For a second time this court is called upon to review the constitutionality of a plan ordered by the District Court for the school system of Dayton, Ohio, to remedy cumulative constitutional violations found to exist in that school system. Reference is made to the previous decision of this court, reported at 503 F.2d 684 (6th Cir. 1974), for a detailed recitation of facts and issues.

By a statute enacted February 22, 1887, the State of Ohio abolished separate schools for white and Negro children. Nevertheless, the District Court found that the Dayton school system has failed in many particulars to meet the standards of Ohio law mandating an integrated school system and to comply with the equal protection clause of the fourteenth amendment. Segregative acts and practices were found to have occurred both before and after the decision of the Supreme

Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and to have continued down to the present time. These findings of fact as to segregative practices in Dayton are set forth in detail in our former opinion and will not be repeated here. Suffice it to say that in our former opinion this court ruled that the findings of fact of the District Court as to unconstitutional practices on the part of Dayton School officials are not clearly erroneous, but to the contrary are supported by substantial evidence.

Although the phrase "de jure" does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation practices. *See Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

We agreed with the District Court as to his findings of fact in our former opinion, but held the remedy ordered by that court to be inadequate, considering the scope of the constitutional violations. We remanded the case to the District Court with directions to formulate a desegregation plan for the Dayton school system consistent with the remedial guidelines outlined in *Keyes, supra*, and in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

In our former opinion we said:

> Once the plaintiffs-appellants have shown that state-imposed segregtation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" *Keyes, supra*, 413 U.S. at 200, 93 S.Ct. at 2693. When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school segregation are inadequate. *Id.* at 210-213, 93 S.Ct. 2686. 503 F.2d at 704.

On remand the District Court required the plaintiffs and the Board of Education to submit plans. The plaintiffs' plan

was rejected. The Board's plan was adopted for the school year 1975-76 with minor modifications.

The present appeal is from the decision of the District Court implementing the Board's plan. The question on appeal is whether the Board's plan conforms to the mandate of this court in our decision reported at 503 F.2d 684. We hold that it does not.

The plan approved by the District Court contains some provisions which apparently might effect some improvements in the segregated conditions found to exist in this school system. Some of its key features are as follows:

1. The closing of Roosevelt High School, with its 100 per cent black enrollment. The students previously enrolled at Roosevelt High would be permitted to attend any high school of their choice.

2. Creation of a downtown magnet high school at the Central YMCA, with programs not offered at home high schools, to serve a maximum of 300 students at any one time, and satellite magnet programs intended to attract students from their high schools and districts of residence, which could serve not more than 375 students at any one time. The District Court said: "If successful, the magnet program will provide an opportunity to students, both black and white, to obtain additional educational advantages equally attractive to both." The students would remain in their assigned schools for all other instruction.

3. Creation of three magnet learning centers at which elementary students could participate in foreign language, career motivation, and business education programs. The three centers together would serve about 880 students, who would remain in their assigned schools for other instruction.

4. Expansion of science centers to accommodate additional elementary students. The centers would have a racially balanced enrollment, and attendance would be mandatory, but only ten percent of the student's total instruction time would be spent at the centers.

5. A new vocational school for high school students, known as Kiser Career Center, would be established. This school would have a balanced racial composition, serving 210 students on a free-choice basis.

6. Restructuring of Miami Chapel elementary school into an alternative elementary school with enrollment optional and on a full-time basis. Miami Chapel has a capacity of over 700 students, but the Board anticipates that the school as restructured will serve approximately 500 students. Miami Chapel presently is an all-black school serving 380 students, and there is some indication in the record that these students, if not admitted to the restructured school, will be assigned to the all-black Louise Troy or Wogaman schools.

7. Creation of a magnet alternative school for 150 intermediate grade level students in an attempt to keep potential drop-outs in school, without regard to race.

8. The freedom of enrollment and open enrollment programs put into effect earlier by the Board would be continued.

In approving this plan, the District Court added the following provisions:

1. All programs including the magnet schools and the learning centers must be so located that the burden of transportation is substantially equal upon both black and white students;
2. The composition of all classes must be no less than the mean for the appropriate schools plus or minus 15%;
3. The faculty assigned to all programs must reffect the racial percentages of faculty within the system as a whole;
4. The amount of time of students assignment to classes in learning centers shall not be less than 20% of such student's total instructional time.

This is essentially all the relief afforded by the District Court

for the 1975-76 school year. The court expressed uncertainty as to whether the plan would be completely effective and ordered the Board to develop and file a more comprehensive plan by January 1, 1976. The court stated that if the 1975-76 plan should prove to be ineffective, an alternate plan would be instituted for the school year beginning in September 1976.

The District Court described the approved plan as "desegregative in intent" and concluded that it would have "an integrative effect." It appears that the plan contains some significant curricular innovations and that it would be a step toward integration of the Dayton school system. We believe, however, that more is required by the Constitution, by recent decisions of the Supreme Court, including those herein cited, and by the previous mandate of this court. As the appellants point out, under the plan approved by the District Court the basic pattern of one-race schools will continue largely unabated. The plan does not even purport to dismantle Dayton's one-race schools other than Miami Chapel and Roosevelt High School, and even if the magnet plans are successful, the vast majority of one-race schools will remain identifiable as such. The District Court's plan fails to eliminate the continuing effects of past segregation and is, therefore, inadequate.

In the course of his opinion, the District Judge noted two events which have occurred since our first opinion in this case, both of which he thought supported the narrow remedy he ordered on remand.

The District Court said:

> First: Effective October 20, 1974, the Congress of the United States adopted the Equal Educational Opportunities Act, 20 U.S.C. § 1701 *et seq.*
>
> Section 1701 declares it to be the policy of the United States that:
>
> "1. All children enrolled in public schools are entitled

to equal educational opportunity without regard to race, color, sex, or national origin; and

2. The neighborhood is the appropriate basis for determining public school assignment."

Section 1712 imposes a limitation upon courts in the following language: "In formulating a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct *particular denials of equal educational opportunity or equal protection of the laws.* [Emphasis added]

In § 1713 is listed a priority of remedies and in § 1714 there is a specific limitation which holds: "No court . . . shall pursuant to § 1713 of this Title order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such students."

Second: On December 6, 1974, the United States Court of Appeals for the Sixth Circuit decided *George and Carolyn Higgins* v. *Board of Education of the City of Grand Rapids,* (No. 73-2189), 508 F.2d 779 (1974). The Court in *Higgins* followed *Deal* v. *City of Cincinnati Board of Education,* 369 F.2d 55, *cert. denied* 389 U.S. 847, in these words: "*Deal* [upheld] the constitutionality of retaining neighborhood schools where racial imbalance has not been caused by any discrimination on the part of school officials."[6]

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[6] *Higgins* mentions *Brinkman* v. *Gilligan* on page 19. This Court respectfully suggests that the following sentence contained therein: "These three findings were held in their cumulative effect to be enough to reflect *de jure* segregation.", requires for full significance an examination of the specific holding of the court.

The Equal Educational Opportunity Act of 1974 by its terms does not prevent the District Court from carrying into effect

the previous mandate of this court. 20 U.S.C. § 1702(b) expressly provides:

> (b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, *except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.* (Emphasis supplied.)

We construe the 1974 Act, read as a whole, as not limiting either the nature or the scope of the remedy for constitutional violations in the instant case.

There could be no possible merit in the contention that the opinion of this court in *Higgins,* relating to the school system of Grand Rapids, Michigan, altered in any way the nature of the cumulative violations described in our former opinion in the present case or the scope of the constitutional remedy required by this court on the remand which we directed in that opinion. The law in the present case is embodied in the opinion of this court reported at 503 F.2d 684. Our previous opinion is not changed in any way by *Higgins,* which dealt with a different school system and a distinguishable factual situation.

Appellants have petitioned for summary reversal. Except for the time factor, we would be inclined to grant this relief. However, it obviously would be difficult if not impossible, in the limited time now available, for the District Court to formulate a comprehensive plan for the 1975-76 school term and to put it into effect in September 1975 without disruption of the large school system in the Dayton school district.

Instead of summary reversal, we remand this case to the District Court with directions to modify the plan previously approved for the 1975-76 school year so as to improve the racial

balance before September 1, 1975, in as many of the remaining racially identifiable schools in the Dayton system as feasible.

We further direct that black students who attended the Miami Chapel elementary school during the 1974-75 school year, and who are not assigned to the restructured Miami Chapel school, be assigned to other than all-black schools during the 1975-76 school year.

The District Court already has expressed an intention to adopt a revised and improved plan for the school year 1976-77. On remand we direct that the court adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keys* and *Swann*. We direct that this plan be adopted not later than December 31, 1975, so that it may be placed in effect at the beginning of the new school year in September 1976.

This case is remanded to the District Court for further proceedings consistent with this opinion.

The mandate of this court on the present appeal will issue forthwith. The costs of this appeal are taxed against the Dayton Board of Education.

G. JUNE 24, 1975 REMAND JUDGMENT OF COURT OF APPEALS

(Filed June 24, 1975)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1410

MARK BRINKMAN, ET AL.,

Plaintiffs-Appellants,

v.

JOHN J. GILLIGAN, ET AL.,

Defendants-Appellees.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from

the Dayton Board of Education the costs on appeal, as itemized below, and that execution therefore issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
By /s/ GRACE KELLER
Grace Keller
Chief Deputy

Issued as Mandate: June 24, 1975
COSTS: Amount to be determined later
Filing fee ----------$
Printing $
Total $

A True Copy.

Attest:
John P. Hehman, Clerk
By /s/ GRACE KELLER
Chief Deputy

H. ORDER OF DECEMBER 29, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-75-304

MARK BRINKMAN, et al.,
Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,
Defendants.

ORDER

This matter is before the Court pursuant to Order of Remand by the United States Court of Appeals for the Sixth Circuit expressed in the following terms:

> We direct that the Court adopt a system-wide plan for the 1976-1977 school year that will conform to the previous mandate of this Court and the decisions of the Supreme Court in *Keyes* and *Swann*.[1]

Pursuant to such remand, defendant Dayton Board of Education and plaintiff NAACP presented plans to the Court. Testimony and evidence in support thereof was presented on December 8-9, 1975. A third plan based upon findings by the late Dr. Charles A. Glatt, Court-appointed expert, was presented by a group known as "Friends of Dr. Glatt" although no evidence or testimony accompanied such plan. The Court notes in passing the significant contribution of Dr. Glatt to this most complex problem.

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[1] *Brinkman* v. *Gilligan*, 518 F.2d 853 at 857.

A determination of this matter and its future progress will be considered under the following headings:

I. Standards of Examination

II. Master

III. Community Participation

IV. Conclusions of Law

I.

STANDARDS OF EXAMINATION

Given the predicate that the limited segregatory activities found by this Court in its Order of February 7, 1973, brings this matter within the ambit of *Swann*[2] and *Keyes*,[3] the remedy must be obvious. This Court now reaches the reluctant conclusion that there exists no feasible method of complying with the mandate of the United States Court of Appeals for the Sixth Circuit without the transportation of a substantial number of students in the Dayton school system. Based upon the plans of both the plaintiff and defendant the assumption must be that the transportation of approximately 15,000 students on a regular and permanent basis will be required. No contrary remedial suggestion has been offered by any person or group. No authority has been found or cited that would justify any other disposition.

An analysis of the two plans submitted discloses more a difference of technique than a difference of result. In essence, the plaintiffs would pair and cluster existing elementary schools in a fashion to insure a racial balance approximating that of the school district as a whole with existing attendance zones of such schools remaining approximately intact. The existing

[2] *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1973).

[3] *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

elementary schools would provide feeder patterns for the appropriate high schools. Under plaintiff's plan almost every student would at some time be transported to and from school.

Defendants' plan is based upon a series of choices to be made by parents which will provide educational alternatives.[4] Defendants have agreed that there is nothing inherent in their plan to prevent racial balancing appropriate to the district as a whole and it is in this context that such plan has been considered.

It would be foolish indeed to ignore the rhetoric that has accompanied twenty years of the school desegregation problem. The catch phrases, "forced busing," "equality education," "racial balance," and "white flight," have served as a form of shorthand mainly to obscure rather than to clarify the nature of the problem involved.

This Court's position and determination can best be understood by a reference to personal judicial philosophy as it bears upon the overall subject of educational racial discrimination.

I believe that it is not the function of the United States District Court to oversee the methods whereby children are instructed. I believe that it is not the function of the United States District Court to advance by judicial fiat any social philosophy, however benign. The temptation to do either or both has proved almost irresistible in the field of school desegregation.

The qualitative nature of education is a matter for local determination. The citizens of a school district are entitled to select, free from federal supervision, those elected representatives who in the citizens' collective opinion will best administer such school system. The citizens are entitled to determine the amount they are willing to pay for the educational

[4] Counsel for the defendants has asserted that defendants have "submitted" a plan rather than "proposed" or "recommended a plan. In view of this Court's holding (page 8), the distinction appears irrelevant.

facilities they desire. It might appear that the foregoing statement is basic enough to be included in an eighth grade Government text. True. But the significance of this lesson apparantly has been lost upon those who ignore its validity. It is only when elected representatives deny equality of treatment that federal courts should intervene.

It can be urged with assurance that in a pluralistic society all children should be exposed at the earliest feasible time to children of other backgrounds. True. I agree that both the children and society itself will benefit. I do not agree, however, that a failure of exposure, in and of itself, amounts to a constitutional deprivation correctable only by the federal courts. In sum, there are aspirations of a peaceful and happy society that do not rise to a constitutional level and are not therefore attainable in a court of law.

Court deal with rights, not ethical behavior, not social accommodations, but rights, rights guaranteed by the Constitution of the United States. That is and should be the limit of our function.

In contrast to the foregoing, it is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.

The only feasible method of sharing requires a balancing in each school between black and white students in a ratio approximating the system-wide balance. Insofar as either plan will result in an acceptable redistribution, such plan meets the constitutional limitations set forth in both the *Swann* and *Keyes* cases.

The defendants may adopt their own plan, may adopt the plaintiff's plan, may combine the two, or any parts thereof, provided that each school in the school district as of September 1, 1976, is desegregated as defined herein.

Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced: None is acceptable if not.

At this time the composition of the Dayton School District is approximately 48% black — 52% white. So long as the schools of the Dayton School District each reflect this district ratio plus or minus 15%, they will be deemed to be desegrated.[5] Accordingly, this Court does therefore ORDER that as of September 1, 1976, each and every school in the Dayton School District will have a pupil population approaching the district percentage, but deviating no more than 15%, plus or minus.

There is a specific and limited exception from the foregoing that the Court will permit. Under the present system in force in Dayton, Ohio, students commence attendance at a specific high school in the tenth grade and remain there until graduation some three years later at the end of the twelfth grade. A high school is more than a collection of classrooms. It is an entity in which the students take deep pride. It is frequently the first and often the last educational entity with which students identify. There would appear to be something unfair in a situation that might destroy the continuity of athletic teams, student publications and activities. The one or two years already spent in a high school has created a loyalty that should be encouraged. There are all too few such institutions still remaining in our society today.

Limited only to high school students and limited only to the academic years of 1976-1977 and 1977-1978, the Court will permit those students already enrolled in a specific high school to graduate from that high school, even though the ultimate determination of attendance boundaries would exclude them therefrom. This privilege shall not be extended to any student not already enrolled in the tenth or eleventh grades of a specific high school.

The Court notes the following language in *Swann*:

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[5] See Footnote 12, *Higgins v. Board of Education of the City of Grand Rapids*, 508 F.2d 779 at 787 (6th Cir. 1974).

> The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.[6]

In a situation, however, where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis.

II.

MASTER

In the achieving of the redistribution required on a school-by-school basis, the ~~guidelines~~ will be followed wherever possible for elementary students.

1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
2. Students should be transported to the nearest available school;
3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

The logistics involved will be complex and time-consuming. The establishment of attendance zones for each of the schools will require supervision by this Court. Accordingly, in accordance with Rule 53 of the Federal Rules of Civil Procedure, the Court does find that this case is one wherein exceptional conditions require the appointment of a Master.

Dr. John A. Finger of Providence, Rhode Island, is hereby appointed Master to supervise such undertaking. Such Master will have all of the powers set forth in Rule 53(c),

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[6] *Swann*, *supra* at page 24.

Fed. R. Civ. P., and will at the earliest possible time submit to this Court a report indicating the number of students by race who will attend each of the schools in the Dayton school system in accordance with the direction set down heretofore. An opportunity will be given to the defendant to obtain promptly information regarding parent choices as outlined on pages 81-83 of the defendant's plan. Such Master will receive out-of-pocket expenses and compensation for his services rendered in such amount as the Court may determine. Previous Orders of this Court directing assistance to Dr. Finger will apply equally to his service as Master.

III.

COMMUNITY PARTICIPATION

The parties are in agreement that a citizens board should be appointed to monitor the plan as ultimately adopted and to insure that it functions in accordance with the Order of this Court. Such a board composed of representative citizens of the community will be appointed for a period not to exceed three years. The Court will reserve the right to extend or to terminate the services of such board, should such prove advisable. Defendants are directed to make space available for the needs of such board, to provide necessary secretarial and clerical assistance, and to make available at all reasonable times such information as the board may from time to time require. The members of this board will serve without compensation, but will be reimbursed for out-of-pocket expenses which will be taxed as court costs in this matter.

IV.

CONCLUSIONS OF LAW

A.

A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated

system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education.*

B.

Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such system.

C.

Educational techniques, experimental schools and expanded parent choice are not matters relating to constitutional deprivations so long as the requirements of Conclusion of Law A are followed.

D.

Defendant, Dayton Board of Education, must provide adequate transportation for all students affected by reassignment to comply with this Order.

It is so ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

I. JUDGMENT OF DECEMBER 29, 1975

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-75-304

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,

Defendants.

JUDGMENT

(Filed December 29, 1975)

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that limited only to high school students and limited only to the academic years of 1976-1977 and 1977-1978, the Court will permit those students already enrolled in a specific high school to graduate from that high school, even though the ultimate determination of attendance boundaries would exclude them therefrom. This privilege shall not be extended to any student not already enrolled in the tenth or eleventh grades of a specific high school. Where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis.

In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary students.

1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;

2. Students should be transported to the nearest available school.

3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

The establishment of attendance zones for each of the schools will require supervision by this Court. Accordingly, in accordance with Rule 53 of the Federal Rules of Civil Procedure, the Court does find that this case is one wherein exceptional conditions require the appointment of a Master.

Dr. John A. Finger of Providence, Rhode Island, is hereby appointed Master to supervise such undertaking. Such Master will have all of the powers set forth in Rule 55 (c), Fed. R. Civ. P., and will at the earliest possible time submit to this Court a report indicating the number of students by race who will attend each of the schools in the Dayton school system in accordance with the direction set down heretofore. An opportunity will be given to the defendant to obtain promptly information regarding parent choices as outlined on pages 81 – 83 of the defendant's plan. Such Master will receive out-of-pocket expenses and compensation for his services rendered in such amount as the Court may determine. Previous Orders of this Court directing assistance to Dr. Finger will apply equally to his service as Master.

The parties are in agreement that a citizens board should be appointed to monitor the plan as ultimately adopted and to insure that it functions in accordance with the Order. A board composed of representative citizens of the community

will be appointed for a period not to exceed three years. The Court will reserve the right to extend to or terminate the services of such board, should such prove advisable. Defendants are directed to make space available for the needs of such board, to provide necessary secretarial and clerical assistance, and to make available at all reasonable times such information as the board may from time to time require. The members of this board will serve without compensation, but will be reimbursed for out-of-pocket expenses which will be taxed as court costs in this matter.

A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education*.

Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such systems.

Educational techniques, experimental schools and expanded parent choice are not matters relating to constitutional deprivations so long as the requirements of Conclusion of Law A are followed.

Defendant, Dayton Board of Education, must provide adequate transportation for all students affected by reassignment to comply with this Order.

Dated at Dayton, Ohio, December 29, 1975

JOHN D. LYTER, CLERK
/s/ Rebecca J. Ellis, Deputy

J. ORDER OF MARCH 23, 1976

No. C-3-75-304

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARK BRINKMAN, et al,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al,

Defendants.

ORDER

(Filed March 23, 1976)

This matter is before the Court for consideration of the Master's report heretofore filed. Pursuant to the filing of such report a hearing was held March 22 and 23, 1976, in accordance with Rule 53(e)(2) of the Federal Rules of Civil Procedure. At such hearing the parties were given an opportunity to present evidence and testimony.

Upon consideration of such report and the testimony and evidence presented, the Court is of the opinion that such report should be disposed of as follows:

I.

ELEMENTARY SCHOOLS

That portion of the Master's report dealing with the desegregation of elementary schools in the Dayton School District by the device of pairing is in keeping with the mandate of the United States Court of Appeals for the Sixth Circuit and the order of this Court dated December 29, 1975. Accordingly, such pairing assignment is hereby adopted.

The Master's report recommends a semiannual exchange of paired schools with a similar exchange assignment of teachers.

Defendant Dayton Board of Education has proposed an annual exchange without movement of teachers (Board Exhibit CW).

Subject to the limitations set forth on page 5 of this Court's order of December 29, 1975,[1] defendant may adopt either method.

The proposal of defendant Dayton Board of Education seeks a three-phase implementation over a three year period. In view of the mandate of the United States Court of Appeals for the Sixth Circuit, 518 F.2d 833 at 857, such "phase in" is hereby rejected.

Certain elementary schools will be desegregated by zone change. Such zone changes as are recommended in the Master's report are hereby approved.

II.

HIGH SCHOOLS

The Master's report for desegregating high schools recommends a selection by students plus a random assignment where necessary (Master's report pp. 15-18). Defendant has suggested an assignment program by specific attendance districts (Board Exhibit CV).

Subject to the limitations set forth on page 5 of this Court's order of December 29, 1975, and subject further to the exception for high school juniors and seniors set forth on pages 5 and 6 of such order, defendant may adopt either method of assignment.

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[1] "At this time the composition of the Dayton School District is approximately 48% black — 52% white. So long as the schools of the Dayton School District each reflect this district ratio plus or minus 15%, they will be deemed to be desegregated. Accordingly, this Court does therefore ORDER that as of September 1, 1976, each and every school in the Dayton School District will have a pupil population approaching the district percentage, but deviating no more than 15%, plus or minus."

III.

MISCELLANEOUS

The report of the Master dealing with "Handicapped and Special Education Program," "Magnet Schools," and "Magnet Programs for Grades 6, 7 and 8" are hereby adopted.

Defendant's attention is directed again to the following portion of the order of December 29, 1975:

> "Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced. None is acceptable if not."

IV.

FURTHER PROPOSALS

The order of reference heretofore referred to directed the Master to report upon particular issues. Portions of the Master's report not dealing with those particular issues will be deemed personal recommendations of such Master and not requiring action by this Court.

This order is intended to be a final and appealable order and a determination pursuant to the mandate of the United States Court of Appeals for the Sixth Circuit.

No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

It must be obvious to all parties concerned that the longer an opportunity is given for students, teachers and the community to understand a specific plan, the easier a transition period will be. In any proposal for a change after this date, the Court will take into consideration the amount of "lead time" available prior to September 1, 1976. In the event the Court determines that a proposed change should be adopted

but that insufficient time remains prior to September 1, 1976, such improvement may be adopted effective September 1, 1977, or such other date as might appear appropriate at the time.

V.

SUMMARY

Defendant has raised five objections to the report of the Master:

1. Pupil assignment should be made by the central administration;
2. Pupil assignment should be made in the spring of 1976;
3. Transfer of elementary students should be made on a yearly rather than on a semester basis;
4. The Elementary School Plan should be a three-phase plan and
5. High School assignment should be on the basis of geographic zone rather than upon choice and random assignment.

The Court has disposed of such objections as follows: With the exception of Objection 4 which has been rejected, the defendant Dayton Board of Education may assign students by action of the central administration, may assign students this spring, may transfer elemeutary school students on an annual basis, and may assign high school students by geographic zones.

All of the foregoing being subject to the limitations of this Court's order of December 29, 1975.

All other questions still remaining before the Court, such as payment of attorney fees and the sharing of costs among the several defendants herein are hereby continued for further disposition.

IT IS SO ORDERED.

CARL B. RUBIN
United States District Judge

K. JUDGMENT OF MARCH 25, 1976

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-75-304

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,

Defendants.

JUDGMENT

(Filed March 25, 1976)

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that upon the consideration of the Master's report and the testimony and evidence presented in accordance with Rule 53(e)(2) of the Federal Rules of Civil Procedure, that such report should be disposed of as follows:

I ELEMENTARY SCHOOLS: That portion of the Master's report dealing with the desegregation of elementary schools in the Dayton School District is hereby adopted. Defendant Dayton Board of Education has proposed an annual exchange without movement of teachers (Board Exhibit CW); the Master's report recommends a semiannual exchange of paired schools with a similar exchange assignment of teachers.

Subject to the limitations set forth on page 5 of this Court's Order of December 29, 1975, defendant may adopt either method. Certain elementary schools will be desegregated by zone change. Such zone changes as are recommended in the Master's report are hereby approved.

II HIGH SCHOOLS: The Master's report for desegregating high schools recommends a selection by students plus a random assignment where necessary (Master's report pp. 15-18). Defendant has suggested an assignment program by specific attendance districts (Board Exhibit CV). Subject to the limitations set forth on page 5 of this Court's Order of December 29, 1975, and subject further to the exception for high school juniors and seniors set forth on page 5 and 6 of such order, defendant may adopt either method of assignment.

III MISCELLANEOUS: The report of the Master dealing with "Handicapped and Special Education Program," "Magnet Schools," and "Magnet Programs for Grades 6, 7, and 8" are hereby adopted. Defendant's attention is directed again to the following portion of the order of December 29, 1975: "Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced. None is acceptable if not."

IV FURTHER PROPOSALS: No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

In any proposal for a change after this date, the Court will take into consideration the amount of "lead time" available prior to September 1, 1976. In the event the Court determines that a proposed change should be adopted but that insufficient time remains prior to September 1, 1976, such

improvement may be adopted effective to September 1, 1976, such improvement may be adopted effective September 1, 1977, or such other date as might appear appropriate at the time.

The following objections were raised by Defendant and are disposed of as follows:

1. Pupil assignment should be made by the central administration;
GRANTED;

2. Pupil assignment should be made in the spring of 1976;
GRANTED;

3. Transfer of elementary students should be made on a yearly rather than on a semester basis;
GRANTED;

4. The Elementary School Plan should be a three-phase plan;
REJECTED;

5. High School assignment should be on the basis of geographic zone rather than upon choice and random assignment;
GRANTED;

THE FOREGOING BEING SUBJECT TO THE LIMITATIONS OF THIS COURT'S ORDER OF DECEMBER 29, 1975.

All other questions still remaining before the Court are hereby continued for further disposition.

APPROVED FOR ENTRY:

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

JOHN D. LYTER, CLERK
/s/ REBECCA J. ELLIS
Rebecca J. Ellis, Deputy

Dated at Dayton, Ohio, this
24th day of March, 1976.

L. ORDER OF MAY 14, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3--75-304

MARK BRINKMAN, et al.,
Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,
Defendants.

ORDER

(Filed May 14, 1976)

This matter is before the Court on the motion of defendant Dayton Board of Education dated May 11, 1976, to modify the Report of the Master. Such motion is in six branches. The first five branches of such motion refer to matters that appear to be within the limits of modification set forth by this Court in its Order of March 23, 1976. Such five branches are hereby GRANTED.

The request in branch no. 6 is not within the permissive changes in the Order of March 23, 1976 and such branch of motion is hereby DENIED.

It is so ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

M. OPINION OF COURT OF APPEALS DATED JULY 26, 1976

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-1854

MARK BRINKMAN, et al.,

Plaintiffs-Appellees,

v.

JOHN J. GILLIGAN and DAYTON BOARD OF EDUCATION, et al.,

Defendants-Appellants.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed July 26, 1976

Before: PHILLIPS, Chief Judge; PECK and LIVELY, Circuit Judges.

PER CURIAM. The Dayton, Ohio Board of Education (the Board) appeals from a judgment of the district court entered on March 25, 1976 which implemented its desegregation order and judgment of December 29, 1975. This court has considered two previous appeals in this litigation and our opinions are published at 503 F.2d 684 (1974) and 518 F.2d 853 (1975). This court concluded that the desegregation order

from which the second appeal was taken (by the plaintiffs) was inadequate and we remanded the case to the district court with specific instructions, as follows:

> On remand we direct that the court adopt a systemwide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*. We direct that this plan be adopted not later than December 31, 1975, so that it may be placed in effect at the beginning of the new school year in September 1976. 518 F.2d at 857.

After considering a plan proposed by the plaintiffs and one "submitted" but not "proposed" or "recommended" by the Board, the district court filed an order and a judgment on December 29, 1975. The judgment provided, in part, as follows:

> A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education.*
>
> Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such systems.

The judgment also permitted high school students already enrolled at a particular school to graduate from that school regardless of attendance zone boundaries. The judgment contained guidelines to be followed "wherever possible for elementary students":

> 1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
>
> 2. Students should be transported to the nearest available school.
>
> 3. No student should be transported for a period of

> time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

Dr. John A. Finger, Jr. was appointed Master to establish attendance zones and a citizens board was authorized to monitor "the plan."

On March 15, 1976 the Master filed a report containing recommended desegregation plans for the elementary schools and the high schools of the Dayton system. The report contemplated achieving desegregation of the elementary schools by a combination of redefining attendance areas and the pairing of schools. Under the plan proposed for the high schools attendance zones would be the primary tool. In a judgment entered March 25, 1976 the district court adopted the portion of the Master's report dealing with the elementary schools and approved the Master's recommended zone changes. However, the Board was given the option of making annual exchanges between paired schools without a movement of teachers or semi-annual exchanges of both pupils and teachers as recommended by the Master. The judgment also permitted the Board to implement high school desegregation by employing an assignment program by specific attendance districts rather than following the Master's proposal of permitting school selection by students plus random assignments as necessary to achieve the mandated plus or minus 15% range. The court denied the Board's proposal for a three year phase-in of the elementary school plan.

The March 25 judgment contained this additional provision:

> IV FURTHER PROPOSALS: No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

On appeal the Board argues that the remedy ordered by the district court exceeds the scope of the violations. It is argued that the district court has adopted a fixed percentage formula to achieve racial balance in the Dayton schools contrary to the holding of the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Board relies particularly upon the Court's statement that the constitutional requirement for school desegregation does not mean that "every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24.

This court has previously held that the practices of the Dayton school system constituted de jure segregation, citing *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973). *Brinkman, supra*, 518 F.2d at 854. Though this court ordered systemwide desegregation, the Board proposed no plan to achieve this mandate and made no showing of the existence of conditions related to the topography of the Dayton area, location of natural or artificial barriers, geographic isolation or similar considerations which might militate against an order requiring cross-district transportation of pupils. *Compare Goss* v. *Board of Education of Knoxville*, 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

The student composition of the Dayton school system is approximately 48% black and 52% white. Application of the district court's requirement that each school's ratio be within plus or minus 15% of the racial makeup of the system will permit black enrollments at particular schools to range between 33% and 63%. Rather than establishing a fixed mathematical requirement as the Board claims it does, this formula provides a flexible basis of pupil assignment similar to that approved by the Supreme Court in *Swann, supra*. The flexibility of the district court's judgment is further illustrated by the exemption of two entire grades of high school students, the provision for variations from the plus or minus 15% requirement "in exceptional circumstances" and the options

granted the Board which permitted it to choose alternate methods of achieving desegregation rather than being required to follow in every detail the plan submitted by the Master. We view the use of mathematical ratios in this case as no more than "a useful starting point" in shaping a remedy for past discrimination. *Swann, supra,* 402 U.S. at 25.

Our conclusions are in accord with those of other courts of appeals which since *Swann* have approved desegregation plans requiring system-wide adherence, within an established percentage range, to the student racial composition of the district. *See, e.g., Morgan* v. *Kerrigan,* 530 F.2d 401 (1st Cir.), *cert. denied,* 44 U.S.L.W. 3719 (U.S. June 10, 1976); *Harrington* v. *Colquitt County Board of Education,* 460 F.2d 193 (5th Cir.), *cert. denied,* 409 U.S. 915 (1972); *United States* v. *School District of Omaha,* 521 F.2d 530 (8th Cir.), *cert. denied,* 423 U.S. 946 (1975); *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973); *Keyes* v. *School District No. 1, Denver,* 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976).

The Board also argues that the district court based its judgment on a misconception of the constitutional requirements for a unitary school system. In its order of December 29, 1975, which discussed the provisions contained in the separate judgment entered the same day, the district court wrote —

> . . . it is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.

When considered out of context and read literally the quoted language does appear to create a right which the federal courts have never recognized. However, in the context of the order this statement appears to be nothing more than an affirmation that a system-wide desegregation plan must necessarily involve all the facilities of a school system and that pupil assignments will be made as required to eliminate the vestiges of

past discrimination without regard to the comparative quality of the various facilities. Be that as it may, the quoted language does not appear in the judgment, which is the instrument this court reviews on appeal.

At oral argument counsel for the Board contended that there is implicit in the judgment of the district court a requirement for periodic changes in the Dayton plan to maintain the required racial mix and that this violates the rule enunciated by the Supreme Court in *Pasadena City Board of Education* v. *Spangler,* —— U.S. ——, 44 U.S.L.W. 5114 (U.S. June 28, 1976). The short answer to this argument is that the judgment directs no changes after the 1976-77 school year. The district court did not adopt *in toto* the Master's report in which there was speculation about the necessity for future adjustments in the plan. The *Spangler* decision held that after Pasadena had established a unitary school system the district court could not require annual adjustments in attendance zones to prevent the development of racially identifiable schools within the system, where subsequent changes in the racial mix are caused by factors for which the school authorities could not be considered responsible. The judgment appealed from in the present case established the first constitutionally sufficient desegregation plan for the Dayton system. If adjustments to this plan are sought by any of the parties in future years the district court will necessarily consider the limitations of *Spangler* in dealing with such requests.

The judgment of the district court is affirmed.

Supreme Court, U. S.
FILED
MAR 8 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume I

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-539

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN, and
PHILLIP BRINKMAN,
By Their Mother and Next Friend,
Donna Brinkman, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

Petition For Certiorari Filed October 18, 1976
Certiorari Granted January 17, 1977

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I. RELEVANT DOCKET ENTRIES

4-17-72	Complaint filed in District Court.
7-14-72	Plaintiffs file application in District Court for hearing on the request for preliminary injunction for 1972-73 school year.
7-24-72	Answer of Defendants Dayton Board, James D. Hart, William E. Goodwin and Josephine Groff filed in District Court.
11-13-72 to 12-1-72	District Court holds hearing on violation issues as framed by the District Court.
2-7-73	District Court issues its Findings of Fact and Memorandum Opinion of Law.
3-30-73	Plans of Dayton Board, minority members of Dayton Board and Superintendent filed with District Court.
4-24-73	Plaintiffs file in District Court objections to the plan proposed by the Board majority.
7-13-73	District Court issues its supplemental order on remedy.
7-23-73	Plaintiffs file notice of appeal with District Court.
8-13-73	Defendants Dayton Board, et al., file notice of appeal with District Court.
8-20-74	Court of Appeals issues opinion affirming District Court's holding of a cumulative violation and remands for formulation of an adequate desegregation plan.
1-7-75	District Court issues order requiring submission of plans.
2-3-75	Plan of Dayton Board filed with District Court.
2-3-75	Alternative plan of plaintiffs filed with District Court.

2-17-75 to 2-20-75 District Court holds hearings on plans submitted.

3-10-75 District Court issues order on remedy.

3-18-75 Plaintiffs file notice of appeal with District Court.

6-24-75 Court of Appeals issues opinion and remands action to District Court.

11-5-75 District Court Order requiring Dayton Board to submit plan on or before 12-1-75 and appointing Dr. John A. Finger as consultant.

11-18-75 Order of District Court relating to establishment of guidelines for plan.

12-2-75 Dayton Board submits desegregation plan to District Court for consideration.

12-8-75 to 12-9-75 District Court held hearing on plans submitted to Court.

12-29-75 District Court's order and judgment ordering redistribution of pupils and appointing Dr. John A. Finger, Jr. as Master.

1-2-76 District Court's supplemental order correcting factual issue in 12-29-75 order.

1-8-76 Motion filed with District Court by Dayton Board to alter or amend judgment.

3-15-76 Master files report with District Court and hearing set.

3-22-76 to 3-23-76 District Court held hearings on report of Master.

3-23-76 District Court's final order relating to desegregation plan.

3-25-76 Judgment entry of District Court embodying order of 3-23-76 filed.

4-15-76 Notice of appeal filed by Dayton Board with District Court.

4-15-76 Application of Dayton Board for stay.

4-19-76 Order of District Court denying stay.

5-11-76 Application of Dayton Board to District Court for modification of report of Master.

5-14-76 Order of District Court granting modification except as relates to eighth graders.

6-1-76 Motion of Dayton Board directed to Court of Appeals to stay judgment.

6-16-76 Order of Court of Appeals denying stay.

7-26-76 Order of Court of Appeals affirming District Court's judgment of March 25, 1976.

7-28-76 Motion of Dayton Board directed to Court of Appeals to stay judgment pending writ of certiorari.

8-16-76 Order of Court of Appeals denying motion for stay.

8-17-76 Application to Associate Justice of Supreme Court for stay.

8-19-76 Request for stay denied by Associate Justice; writ of certiorari filed with Supreme Court.

10-27-76 Request for certification and transmittal of record filed with District Court.

1-17-77 Petition for writ of certiorari granted by Supreme Court.

II. OPINIONS BELOW.

A. DISTRICT COURT'S FEBRUARY 7, 1973 FINDINGS OF FACT AND OPINION OF LAW.

(Filed February 7, 1973)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

**FINDINGS OF FACT AND
MEMORANDUM OPINION OF LAW**

This is a school desegregation suit brought as a class action by the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education. This Court has proper equity jurisdiction under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; see *Brown* v. *Board of Education,* 347 U.S. 483, 495 (1954); 349 U.S. 294,, 300-301 (1955), and under 28 U.S.C.A. §§ 1981 and 1983, 42 U.S.C.A. § 1343.

This matter is before the Court upon the briefs, stipulations and exhibits presented by the respective parties; and upon the record adduced during expedited hearing conducted by

Court from November 13 through December 1, 1972. The limited question before the Court at said hearing was whether acts by the defendant Dayton School Board have created segregated educational facilities in violation of the Equal Protection Clause.

Having carefully examined the evidence presented, the Court, pursuant to Rule 52(a), Fed. R. Civ. P., enters the following findings of fact and memorandum opinion of law.

I

FINDINGS OF FACT

A. Historical Perspective

(1) The evidence presented has established isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system.[1] Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in high schools in the 1930's and 1940's and

[1] Section 3313.48, Ohio Revised Code, provides in relevant part that:

> "[t]he Board of Education of each city . . . shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof . . ."

This has been the law of Ohio since February 22, 1887, when it was enacted by 85 Ohio Laws 34. The statute was upheld and enforced in 1888 by the Supreme Court of Ohio in *Board of Education* v. *State*, 45 O.St. 555, as follows:

> "Section 4008 having been repealed by the Act of the General Assembly passed February 22, 1887 (84 Ohio Law 34), separate schools for colored children have been abolished and no regulation can be made under 4013 that does not apply to all children, irrespective of race or color:"

the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference.[2]

Prior to *Brown*, however, physical isolation of black students ended, swimming pools were no longer restricted, and black athletic teams competed on an equal basis with all other Dayton High Schools.

While arguably consistent with the social mores of the times, the treatment of black children during this period was at least inhumane and by present standards, reprehensible. The practices of the Dayton School Board were also, during that period, in contravention of Ohio law as cited in n.1, *supra*. Both by reason of the substantial time that has elapsed and because these practices have ceased, however, the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy.

(2) Not to be dismissed on a *deminimus* theory are the practices of the Dayton School Board with regard to the hiring and placement of its teachers. In the past thirty-odd years three separate policies have been followed. Until the decade of the 1930's, there was little, if any, hiring of black teachers. Those who were hired were used in instruction of predominately black classes. During and following World War II the black population of Dayton substantially increased. Black teachers were hired in greater number, although such teachers did not teach in schools which were predominately white. While there is no direct evidence that black teachers were forbidden to teach white children at any school, in practice few actually did. Some evidence consistent with the assumption that black educators and black principals would be more understanding, sympathetic, and inspiring to black students has been suggested to the Court.

[2] For a period in the 1930's and 1940's, the Shawen Acres Orphan Home sent its black and white wards to different schools. Some white children of medical personnel of the Veterans Hospital in Dayton were bused by the hospital to "white" schools. The Dayton School Board, while not initiating these practices, condoned and assisted them.

In the 1951-52 school year, the policy of assigning black teachers only to black schools ended and black teachers were gradually assigned to white or mixed schools. By 1963, under a policy designated as one of "dynamic gradualism," at least one black teacher had been assigned to all eleven high schools and to 35 of the 66 schools in the entire system.

By 1969 each school in the Dayton system had an integrated teaching staff consisting of at least one black faculty member. In the fall of 1971, pursuant to an agreement with the Department of Health, Education & Welfare (H.E.W.), the Dayton Board of Education commenced assigning faculty in such a manner that the ratio between black and white teachers in each school substantially reflected the ratio between black and white teachers in the system as a whole. Pursuant to this agreement the teaching staff of the Dayton Public Schools became and still remains substantially integrated.

By 1969 the Dayton School Board employed more black teachers than any other of the 20 largest school districts in Ohio. At that time 28.6% of all teachers were black while 38.3% of all students were black. For the school years 1971-72 and 1972-73, blacks comprised 38% of the non-teaching, non-administrative personnel employed by the Board of Education. Employment of blacks in other positions such as skilled craftsmen, however, remains substantially below the percentage of black students population or the percentage of black teachers and black administrators.

(3) In 1933, the Paul Lawrence Dunbar High School was established. Dunbar High School was intended to be, and did in fact became, a black high school, with an all black teacher and pupil population. At the time of its creation, there were no school attendance zones in Dayton and students were permitted liberal transfers. Attendance at Dunbar was voluntary.

In the 1940's and early 1950's, after reorganization into a K-8, 9-12 grade structure, high school and elementary school

attendance zones were established and encorced in Dayton. Dunbar continued to exist as a city-wide all-black high school until it closed in 1962.

B. The Dayton Public School System Today

(a) Racial Imbalance

(4) The great majority of all schools in the Dayton system today have student populations which are racially imbalanced, consistent with the black-white population and geographical distribution thereof as shown by the 1970 census.[3] Except at the Patterson Co-op High School, where in the past few years a concerted effort has been made to enroll more black students, no effort has been made by the school board of Dayton to balance by race the student population at any particular school. See Appendix A, *post* at 15.

(b) Attendance Zones

(5) There has been presented no evidence of boundary changes that would channel blacks or whites into specific schools or would restrict blacks from attending any school. Where construction of new schools has required boundary changes, they have been rational, reasonable and within the sound discretion of the Board of Education. No irregular school zones have been created, white students have not been bused past black schools to white schools, nor have black students been bused past white schools to black schools.

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[3] The 1970 census for the city of Dayton indicates 71 census tracts, 45 with a black population of less than 15%, eight with a black population between 15% and 85%, and six with a black population of 85% to 100%.

While the Dayton School District is not geographically identical to the city limits of the City of Dayton, the variations are non-significant in the context of the areas' black-white population.

(6) The Dayton School District contains 57 elementary school attendance areas. No evidence has been presented of gerrymandered boundary lines and the attendance districts are regular in shape. Boundary line changes have occurred only when new schools were constructed for the purpose of relieving overcrowding in existing ones. See Appendix A, *post*, at p. 15.

(7) The middle school program was established on January 4, 1971. Middle schools consist of grades 6, 7 and 8. The middle school program has to date been only partly effectuated in the Dayton system. Elementary schools (kindergarten through eight) are still in operation as well as primary schools (kindergarten through five), and middle schools (six through eight). At the present time there are five middle schools in Dayton: Cornell Heights, Longfellow, MacFarlane, Whittier, and Orville Wright. For the racial compositions of these schools, see Appendix A, *post*, at p. 15.

Attendance boundaries for the middle schools were established in September, 1971, and have neither segregative nor integrative effect.

(8) There are presently eleven high schools in Dayton, ten of which have specific attendance areas. The eleventh, Patterson Co-op High School, enrolls students from the entire district for its vocational education program. The black percentage of attendance at Patterson High School has increased due to an altering of recruitment techniques, from 2.0% in 1963 to 32.9% in 1972. No evidence has been presented that under the present selection system the admision of blacks is denied or discouraged or that the system is segregative in effect.

Dayton has constructed five high schools since 1954 and has altered attendance zones where necessary to accommodate the overcrowding of existing high schools. Other than such alterations, no attendance zone boundaries have been changed. No evidence of the establishment of high school boundary lines for the purpose of creating white high schools and black high schools has been presented.

(c) Site selection and construction

(9) Since 1954 the school board of Dayton has constructed 14 new elementary schools and 60 elementary school additions. The construction follows the pattern of growth in the Dayton area and follows the specific policy of "building schools where children are, or where they are expected to be." New construction of elementary schools was largely on the periphery of the center city. There are instances of errors in Board planning in that some areas have not developed as expected and other developed areas have not become part of the Dayton School District, as expected. There are examples of schools operating substantially below capacity. While reasonable minds might reasonably differ on selection and construction of some schools, sufficient evidence has not been presented that school construction was segregative in nature other than to provide schools in white neighborhoods which remain predominantly white and schools in black neighborhoods which remain predominantly black.

(10) Five new high schools and fourteen high school additions have been constructed in the past eighteen years. Constructions of some high schools followed the pattern of construction of elementary schools in that sites selected were away from the center of the city and in neighborhoods which were predominately white. Other sites could have been selected near the center of the city in black neighborhoods. Such schools would arguably, at least, have had a larger proportion of white attending such schools.

Site selection is a matter of judgment and no evidence has been presented that the Board of Education failed to use neutral criteria in its choices. In the construction of schools, the Board, over the years, has been presented with options. Plaintiffs have failed to sustain their burden of showing that the defendant Board exercised those options presented in an improper fashion.

(d) Optional zones

(11) The Board of Education of the Dayton School District has from time to time created optional zones. Optional zones are dual or overlapping attendance areas which allow children residing within them a choice among two or more schools. Some optional attendance zones were created where the more distant school geographically had better access; some were created where the more distant school did not require the crossing of busy intersections, commercial areas, or railroad tracks. Many were created for the convenience of parents. There has been evidence that at times this last concept embraced desires motivated by racial considerations. Seven optional elementary zones and four optional high school zones exist at the present time. All of the others have been abolished. See Appendix B, *post* at 16.

The majority of optional zones had no racial significance at the time of their creation. The Westwood-Jackson, Roosevelt-Colonel White, and Fairview-Roth zones may have constituted exceptions to this general rule and we cannot conclude that these did not have adverse racial effects. Similarly, although none of the elementary school optional zones today have any significant potential effects in terms of increased racial separation, the same cannot be said of the high school optional zones. Two of these zones, those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past.

(e) Freedom of Enrollment

(12) By two separate actions the Board of Education has established a "freedom of Enrollment" policy. On May 29, 1969, action was taken whereby the parents of a pupil in good standing in the Dayton Public School District could request

assignment of the pupil to any school building within the district where space was available to accommodate him. Three priorities were established.

(1) Students residing within the attendance area of a school building shall have first priority to assignment to that building.

(2) Students meeting the requirements for a course available only in the particular building shall have second priority for attendance in that building;

(3) A student desiring enrollment in any building for whatever reason shall have third priority in that building, providing his enrollment will contribute to improved racial balance in that building.

The action of May, 1969, further provided that transportation would be the responsibility of the parents.

On January 3, 1972, the Board of Education resolved to continue the Freedom of Enrollment policy with the exception that the Superintendent and his staff were directed to develop and submit before the start of the second semester of the 1971-72 school year a plan providing for the free transportation of the students participating in such program. Such free transportation was adopted by the Board prior to the filing of the complaint herein.

(13) Applications for transfer and dispositions thereof during the school years 1969-1970, 1970-71, 1971-72, 1972-73, are set forth in Appendix C, *post*, at 17. There is no evidence that the Freedom of Enrollment system has been unfairly operated or that black students have been denied transfers because of their race. There is evidence that the capacity of transferee schools has been underestimated and that projections of future enrollment are substantially overestimated. A neutrally administered freedom of enrollment system might in the future reduce somewhat racial imbalance and remove community perception of "black" and "white" schools. However, as the Freedom of Enrollment system is presently constituted, its input towards that goal has been slight. Requests for

transfer have at no time exceeded 1.5% of the total student enrollment.

C. School Board Action — December, 1971 January, 1972

(14) At the general election in November, 1971, the electors of the school district of Dayton elected three members for a four year term commencing January 1, 1972. Issues at such election involved the matter of school attendance zones and transportation of pupils. Two incumbent members of the Board ran for reelection, one did not. One incumbent was reelected and two new members of the Board were added. On December 8, 1971, the 1971 Board met to consider resolutions dea'ing with transportation of students and zone attendance lines. All members present were duly elected, qualified and acting members of the Board, although two of them were so-called 'lame ducks," who would not be members of the Board after December 31, 1971.

The Board adopted several resolutions. These resolutions recognized the existence of racial segregation in the Dayton schools, the role played by the Board in the creation of the racial patterns and the concommitant responsibility of the Board to eradicate these patterns through affirmative action. The types of affirmative action recognized included the elimination of the old attendance zones and the transportation of students for the purpose of achieving the city-wide racial balance of students. These resolutions, which are set forth in part in Appendix D, *post*, at 18-22, were adopted by the Dayton School Board by a vote of 5-2.

Immediately thereafter, one member of the Board who had voted with the majority, requested reconsideration and was improperly ruled out of order. The Board met subsequently on December 6, 1971 [sic], and January 3, 1972. At the end of the latter meeting, the Board ended its term of office and the 1972 Board took its p'ace. On January 3, at its first meeting, the 1972 Board rescinded the resolutions passed on

December 8. Since the 1971 Board had passed out of existence, the action of the 1972 Board on January 3, 1972, was not in the nature of a reconsideration but instead was a recission of the previous action.

The right of the majority to override protected minority rights has clear limitations in our constitutional democracy. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); also see *Alkire* v. *Cashman*, — F.Supp. — (S.D. Ohio E.D. 1972). The recission in early 1972 of the resolutions adopted by the 1971 School Board constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton. See *Bradley* v. *Milliken*, 433 F.2d 897 (C.A.6 1970); *Oliver* v. *Kalamazoo Board of Education*, 346 F.Supp. 766 (W.D. Mich. S.D. 1971), *aff'd.* 448 F.2d 635 (C.A.6 1971).

OPINION

An examination of the decisional law of this circuit does not provide an identifiable category for the Dayton Public School System. Ohio law, unlike the law of many Southern states, has never mandated the separation of the races in public school; to the contrary, since 1887 it has specifically prohibited this practice. See n.1, supra. The Dayton system is a square peg for the round holes of Memphis, Knoxville, and other southern cities.[4] It is, however, also a round peg

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[4] Compare, for example, the intransigence of the Nashville School Board in *Kelley* v. *Metropolitan County Bd.*, — F.2d — Nos. 71-1778 & 79 (C.A. 6 May 30, 1972). See also *Northcross* v. *Board of Education of Memphis*, 420 F.2d 546 (C.A.6 1970), *aff'd.* 397 U.S. 232 (1970); 444 F.2d 1179, 1184 (C.A.6 1971); *Goss* v. *Board of Education of Knoxville*, 301 F.2d 164 (C.A.6 1962); 305 F.2d 523 (C.A.6 1962); 406 F.2d 1183 (C.A.6 1969); 444 F.2d 632 (C.A.6 1971); *motion for implementation order denied*, 403 U.S. 956 (1971); *Robinson* v. *Shelby County Board of Education*, 442 F.2d 259 (C.A.6 1971); *Mapp* v. *Board of Education of City of Chattanooga*, — F.2d — (C.A.6 October 11, 1972), *rehearing en banc granted* — F.2d — (C.A.6 1972).

for the square hole that is Cincinnati in *Deal* v. *Board of Education*.[5] In *Deal*, which dealt with an urban school system organized under the laws of Ohio, there was no finding that the actions of the school board had contributed in *any* fashion to the segregation of the Cincinnati public schools. We have not found the *Keyes* situation of the transfer of whites to remaining predominately white schools.[6] We have not found the *Bradley* altered attendance zones or the transfer programs that allowed whites to escape from identifiably black neighborhood schools.[7] We have not found the *Davis* pattern of racial discrimination.[8]

What we have found are racially imbalanced schools, optional attendance zones, and recent Board action, which are cumulatively in violation of the Equal Protection Clause. We hold that the totality of these findings require intervention by this Court under the mandate of *Brown* v. *Board of Education*, *supra*.

We do not hold that a school board may not in its wisdom determine to establish 'neighborhood schools." *Gilliam* v. *School Board of Hopewell*, 345 F.2d 325; *Deal*, *supra*; *Goss*, *supra*. But an "optional attendance zone" is a limitation upon this

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[5] 369 F.2d 55 (C.A.6 1966); 419 F.2d 1387 (C.A.6 1969), *cert. den.* 402 U.S. 962 (1971).

[6] *Keyes* v. *School District No. 1*, 303 F.Supp. 279, 289 (D.C. Colo. 1969); 313 F.Supp. 61, 90 (D.C. Colo. 1970), *aff'd. in part, rev'd. in part*, 445 F.2d 990 (C.A.10 1971), *cert. granted* —— U.S. —— (1972).

[7] *Bradley* v. *Milliken*, 338 F.Supp. 582 (E.D. Mich. 1971), *aff'd.* —— F.2d ——, Nos. 72-1809, 72-1814 (C.A.6 Dec. 8, 1972), *rehearing en banc granted* —— F.2d —— (C.A. 6, Jan. 16, 1973). See also *Clemons* v. *Board of Education of Hillsboro*, 228 F.2d 853 (C.A.6 1956).

[8] *Davis* v. *School District of Pontiac*, 443 F.2d 573 (C.A.6 1971), *cert. den.* 404 U.S. 913 (1971).

concept and if carried to an ultimate conclusion, effectively destroys it. If a school board elects to use the neighborhood school concept, it must do so fully and completely. Where there are hazards, natural or artificial, it must so adjust the boundaries in order to protect the children it intends to educate. It may not employ optional zones either to destroy or dilute the neighborhood school concept.

In addition, there appear to be aspects of the system which may in the future become segregative in effect unless steps are now taken that will retard these undesirable tendencies. Without seeking to calibrate the degree of segregation that inheres in individual policies of the Board, we hold that these must be refashioned in such manner as to avoid such future racially disharmonious potential.

Accordingly, the Dayton School Board is hereby instructed to prepare and present to this Court within sixty (60) days a plan that will accomplish the following:

(1) Abolish all optional attendance zones presently remaining within the Dayton school system;

(2) Restate the priorities for high school attendance in the freedom of enrollment plan in order that no student of a minority race may be denied attendance at any high school in the Dayton Public School System and so that transfers for purpose of improving racial balance take precedence over curriculum transfers;

(3) Maintain faculty assignment policies that will reflect in each school the approximate ratio of black to white faculty throughout the district.

(4) Establish hiring policies that will enable the clerical and maintenance personnel hired by the school board of Dayton to approximate the proportion of black-to-white ratio of the Dayton School District.

The foregoing enumerated specifics shall be considered as a minimum. The plan submitted by the defendant Board shall

in all other respects conform to the requirements of law. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970); *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 402 U.S. 33 (1970).

Irrespective of the determination of this Court there will remain in the city of Dayton a substantial black population entitled as a matter of law to equality in education, housing, and job opportunity. No peaceful community can consist of two separate societies viewing each other with mistrust and suspicion from ever higher walls of separation. Education has been historically in our country and remains to this day, one of the primary means of overcoming barriers of class, status and occupation.

A court can only enjoin upon a school board its legal duty. It cannot reach the infinitely more sensitive moral obligation that defies legal measurement. We commend to the School Board of the City of Dayton its moral obligation to provide the highest possible level of education equally for all children entrusted to its care, without distinction or bias or partiality.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX A, FEBRUARY 7, 1973 FINDINGS OF FACT RACIAL COMPOSITION OF DAYTON PUBLIC SCHOOLS (1971-1972)

Elementary schools — % Black:

1. Jane Addams	81.7	27. Jackson Primary	98.8
2. Allen	0.6	28. Jefferson Ele.	60.1
3. Belle Haven	5.0	29. Jefferson Primary	57.1
4. Belmont	0.0	30. Kemp	**0.0**
5. Brown	0.6	31. Lewton	0.0
6. Carlson	99.0	32. Lincoln	0.0
7. Cleveland	0.0	33. Loos	4.6
8. Drexel	5.7	34. Horace Mann	0.2
9. Eastmont	0.0	35. McGuffey	14.4
10. Edison	97.3	36. McNary Park	99.4
11. Emerson	6.8	37. Meadowdale Ele.	8.0
12. Fairport	0.1	38. Miami Chapel	99.9
13. Fairview Elementary	1.7	39. Patterson-Kennedy	0.0
		40. Residence Park Ele.	98.8
14. Ft. McKinley	0.0	41. Residence Park Pri.	99.3
15. Franklin	0.0	42. Ruskin	7.0
16. Gardendale	28.5	43. Shiloh	0.1
17. Gettysburg	5.2	44. Shoup Mill	7.1
18. Gorman	21.1	45. Louise Troy	100.0
19. U.S. Grant	0.1	46. Valerie	7.5
20. Grace A. Greene	96.8	47. Van Cleve	1.1
21. Hawthorne	0.0	48. Washington	19.4
22. Hickorydale	6.6	49. Weaver	99.9
23. Highview	97.0	50. Webster	0.0
24. Huffman	0.0	51. Westwood	99.4
25. Irving	99.0	52. Wogaman	100.0
26. Jackson Elementary	99.1		

Of 52 elementary schools in use as of September, 1972, 29 are more than 90% white and 15 are more than 90% black. The balance range from 19.4% to 60.1% black.

Middle schools – % Black:

1. MacFarlane 99.6
2. Whittier 99.3
3. Cornell Heights 80.5
4. Longfellow 64.1
5. Orville Wright 8.1

High Schools – % Black:

1. Dunbar 100.0
2. Roosevelt 100.0
3. Roth 95.8
4. Colonel White 54.6
5. Patterson Co-op 32 9
6. Fairview 24.1
7. Stivers 14.0
8. Meadowdale 10.6
9. Kiser 9.8
10. Wilbur Wright 9.2
11. Belmont 5.2

APPENDIX B TO FEBRUARY 7, 1973 FINDINGS OF FACT
EXISTING OPTIONAL ZONES

Optional Zone	Date of Creation	Percentage Black School Population At date of creation	1972-73
Elementary schools:			
1. Belle Haven/	1955	0.0	17.7
Fort McKinley		0.0	2.6
2. Residence Park/	1954	a.	100
Jane Addams		29.3 b.	78.7
3. Westwood Ele./	1952	0.0	99.7
Jackson Ele.		35.9	99.9
4. Lincoln/	1957	0.0	0.6
HoraceMann		0.0	3.1
5. Cleveland/	1956	0.0	0.8
Belmont Ele.		0.0	9.4
6. Grant/	1957 c.	0.0	0.3
Belmont		0.0	9.4
7. Eastmont	1957 c.	0.0	0.7
Lewton		0.0	5.8
High schools:			
1. Fairview/	1965	0.9 c.	24.1
Roth		53.5 c.	95.8
2. Roosevelt/	1951	31.5	100.0
Colonel White	extended 1958	0.0	54.6
3. Kiser/	1962	2.7 c.	9.8
Colonel White		1.1 c.	54.6
4. Wilbur Wright/	1956	2.2 b.	9.2
Belmont High		0.0	5.2

a. Figures not available
b. Figures as of 1951
c. Figures as of 1963-1964

APPENDIX C TO FEBRUARY 7, 1973 FINDINGS OF FACT FREEDOM OF ENROLLMENT APPLICATIONS

	1969-70 1970-71	1971-72	1972-73
White applications	133	78	47
Black applications	695	757	741
Totals	828	835	788
White approvals	50	39	23
Black approvals	421	460	460
Totals	471	499	483
White disapprovals	83	76	15
Black disapprovals	274	260	187
Totals	357	336	202
White disapprovals (Lack of classroom space)	16	8	12
Black disapprovals (Lack of classroom space)	164	174	166
Total disapprovals (Lack of classroom space)	180	182	178

APPENDIX D TO FEBRUARY 7, 1973 FINDINGS OF FACT RESOLUTIONS OF THE DAYTON SCHOOL BOARD

At the December 8, 1971, meeting of the Dayton School Board, the following three resolutions were passed, each by a 5-2 vote:

RESOLUTION SEEKING JOINT ACTION TO END SEGREGATION IN EDUCATION, HOUSING AND EMPLOYMENT IN THE METROPOLITAN DAYTON AREA

WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Dayton metropolitan area and other parts of Ohio; and the actions and inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

2. That this Board recognizes that past actions or inactions

of the Board of Education and residential racial segregation are interdependent phenomena.

3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society.

RESOLUTION ASKING FOR STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS

WHEREAS, The Committee of 75 has recommended school integration on a metropolitan basis, and

WHEREAS, the State of Ohio has responsibility and authority for the operation of public schools, and the State Board of Education has the duty to administer the laws relating generally to the operation of the schools, and

WHEREAS, the Ohio Attorney General has ruled that the State Board of Education has the authority to restrict funding in any school district in which said Board finds as a matter of fact that racial segregation exists,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby petitions the State of Ohio and the State Board of Education (a) to obtain from Ohio Civil Rights Commission, U.S. Office of Education and such other sources as it may deem useful, data on racial isolation of faculty, staffs and pupils within and among the several school districts as presently constituted in the metropolitan Dayton area; (b) to develop guidelines and criteria as may be necessary to assure an educationally and socially viable mix of pupils, within the socio-economic characteristics of the metropolitan area as a whole; (c) to require said districts to cooperate in preparing and implementing a plan for assignment of faculty, staffs and pupils in accordance with said guidelines and criteria, and (d) to assure adequate funding from state and district sources to continue the operation of the schools and the implementation of said plans throughout the period of transition and thereafter.

2. That said plans be developed by September 1, 1972 and fully implemented not later than September 1, 1973.

3. That the Clerk of the Board forward a true copy of this resolution to the Governor of the State of Ohio, the Speaker of the House of Representatives, the President of the Ohio Senate and the President of the State Board of Education.

• • •

RESOLUTION ORDERING THE RACIAL AND ECONOMIC INTEGRATION OF PUPILS IN THE DAYTON PUBLIC SCHOOLS

WHEREAS, the Board of Education of the Dayton City School District recognizes a moral and legal duty to provide quality non-segregated education for all students in the district, and,

WHEREAS, integrated education is vital to the achievement

of quality education for all pupils, black and white, rich and poor, and,

5. That this Board view the racial and ethnic mix of the Dayton City School District and of the metropolitan area as assets; that this population, if reflected in each school, could itself contribute to people's learning from each other; and that as a whole, the metropolitan area represents a nearly ideal cross section of the nation that could permit schools here to become a model of American democracy in action.

6. That this Board hereby invites and urges agencies of the federal, state, and local governments and organizations of religious, business, labor, education, communications, civic service, and real estate to assist the Board in desegregation of Dayton schools and to pledge publicly their accelerated efforts to bring about desegregation in housing, education and employment throughout the Dayton metropolitan area.

7. That the Clerk of The Board be and hereby is directed to forward a true copy of this resolution to the following:
   Governor of the State of Ohio
   President of the State Board of Education
   Speaker of the Ohio House of Representatives
   President of the Ohio Senate
   Montgomery County Members of the Ohio General Assembly and United States Congress.
   Montgomery County Commissioners
   Dayton City Commissioners
   Montgomery County Council of Governments
   City Plan Board
   Miami Valley Regional Planning Commission
   Miami Valley Regional Transit Authority
   Metropolitan Housing Authority
   Apartment Owners Associations
   Area Progress Council

Assembly of Area Councils
Chairmen of Democratic and Republican Organizations
Community Affairs Committee
Congress of Representative East Dayton Organizations
Dayton Advisory Council on Education
Dayton Area Board of Realtors
Dayton Area Chamber of Commerce
Dayton Area Junior Chamber of Commerce
Dayton Building Trades Council
Dayton Classroom Teachers Association
Dayton-Miami Valley AFL-CIO
Dayton Model Cities Planning Council, Inc.
Dayton Public Service Union
Dayton Urban League
Deans of Area Colleges of Education
Elementary Principals Association
Metropolitan Churches United
Miami Valley Consortium of Colleges and Universities
Montgomery County Community Action Agency
Montgomery County Council of PTAs
National Association for the Advancement of Colored People
Ohio Association of Public School Employees
Presidents Club
Secondary Principals Association
Southern Christian Leadership Conference

WHEREAS, the Fourteenth amendment to the United States Constitution and the mandate of the United States Supreme Court in Brown v. Board of Education decision and subsequent court decisions place an affirmative duty to dis-establish the segregated attendance patterns which result in whole or in part from its actions and inactions in order to equalize educational opportunity, and,

WHEREAS, segregated educational opportunity and unequal educational opportunities for minority and poor students now exist in the Dayton public schools, and,

WHEREAS, this inequality exists as a result of the acts and omissions of the Board and preceding Boards in their decisions concerning the site selection of school buildings, size of school buildings, changes and adoption of school attendance boundaries, pupil assignment practices, faculty and staff hiring and assignment practices and,

WHEREAS, this Board has requested and received reports of findings and recommendations from the State Department of Education and the Committee of 75,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton that it is the policy of this Board that each school shall enroll pupils in a manner which substantially reflects the racial and economic characteristics of the district as a whole. The Board recognizes that implementation of this policy requires departure from past practices and requires special planning to assure a smooth transition. The Board therefore directs:

1. That the superintendent in consultation with professional staff and the representatives of employee organizations, design and implement a mandatory program of in-service education involving all staff members to prepare staff for changes in enrollments and to develop an individualized, multi-ethnic curriculum in each school.

2. That Dayton Advisory Council on Education be requested to organize a Community Involvement Advisory Committee and a Lay Citizens Financial Review Committee to advise the superintendant during the course of planning and implementing integration programs, as recommended by the Committee of 75.

3. That the superintendent be and hereby is directed to develop and implement plans for the racial and economic integration of pupils using the following guidelines and criteria:

a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

e. Desegregation is to be completed by September, 1972.

f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criterial in c. above.

g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy.

4. That to the maximum feasible extent consistent with this policy statement, recommendations of the Committee of 75, are hereby adopted and may be used in planning and implementing school integration.

5. That the superintendent report on progress and problems concerning implementation of this policy at least every sixty days and that a program for continuous evaluation throughout the phases of implementation be developed by July 31, 1972.

6. That the superintendent prepare applications for supplementary financial assistance from state, federal and other sources that may become available to improve the quality of education and achieve the goals of the Committee of 75 report.

B. DISTRICT COURT'S JULY 13, 1973 SUPPLEMENTAL OPINION ON REMEDY.

(Filed July 13, 1973)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al,

Plaintiffs

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al,

Defendants

SUPPLEMENTAL ORDER ON REMEDY

Pursuant to order of this Court dated February 7, 1973, the defendant School Board of the City of Dayton has submitted a desegregation plan for consideration. A separate plan has been submitted by the minority members of the Dayton School Board, as has one by the Dayton Classroom Teachers' Association, whose motion to file as amicus curiae in this matter is hereby GRANTED. Exhaustive memoranda have likewise been filed by interested parties. The matter is now before the court for determination.

The plan submitted by the defendant Board contains eleven points: Four are directed to the specific requirements imposed by this Court and seven are in response to the Court's sugges-

tion that additional action be undertaken. Such additional action was not specifically mandated by the Court. We do, however, note our disappointment at the limited nature of Points V through XI. While defendant School Board can assert that it was not required by the Court to go as far as it has, a response can be made with equal accuracy that the community relies on the elected members of the School Board to approach the present problem in a sensitive and understanding fashion. The Board's proposals, unfortunately, do not convince us that they have completely attained this desired goal.

We turn to the four points of the plan required by the Court's order. Point I eliminates the optional zones and their attendant segregatory effects. Point III provides for non-racially based faculty assignment practices. Point IV provides for the proper hiring policies of classified personnel. Points I, III and IV are in accord with the requirements of the Court's previous order and as to them, the plan of defendant School Board of the City of Dayton is hereby APPROVED.

Point II, however, which deals with Freedom of Enrollment Priorities, does not entirely meet the required standards. It will be conditionally accepted for elementary schools and middle schools for the school year 1973-74. It will not be accepted for the high schools.

As to the Dayton high schools, the Board is hereby directed to achieve the following:

(1) Any student eligible to attend a Dayton public high school may attend any high school within the Dayton Public School district, provided that students presently enrolled in high schools shall have first priority to complete their education therein.

(2) Each incoming ninth grade class and all vacancies in the tenth, eleventh and twelfth grade classes shall be filed from those pupils seeking admission. Where there is insufficient capacity for all pupils seeking admission, a random selection plan shall be used.

(3) Only insufficient capacity shall be deemed reason to exclude any applying pupil.

(4) Transportation shall be the responsibility of the Board of Education for all students eligible and approved for transfer outside of the attendance area of such students' residences.

The defendant Board of Education will submit to this Court within thirty (30) days of the date of this Order a revised plan to comply with the above. Included in such plan will be a listing of the pupil capacity by grade of each of the high schools within the Dayton Public School District. Plaintiffs will be granted an opportunity to present evidence as to such capacity. The foregoing admission plan shall not apply to the Patterson-Stivers Vocational High School.

There remain for consideration two further questions which the Court has reserved: The matter of the so-called Metropolitan School District and the status of defendants State of Ohio through its Governor and the Ohio Department of Education.

The findings by the Court in its Order of February 7, 1973, and the disposition of the Board of Education's plan appear to moot the metropolitan question and to require the dismissal of these non-Dayton defendants. Plaintiffs are hereby granted thirty (30) days within which to file memoranda on either or both of these questions. Defendants are granted thirty (30) days from the date of such filing to file answer memoranda and plaintiffs are granted thirty (30) days from defendants' filing to file reply memoranda. An evidentiary hearing will be granted upon either of such questions upon the showing of a need therefor.

This supplemental Order has been delayed pending study of the decision of the Supreme Court of the United States in *Keyes* v. *School District No. 1, Denver, Colorado,* —— U.S. ——, 42 U.S.L.W. 5002 (June 21, 1973). The *Keyes* case dealt, for the first time, with a large northern city whose school

system had never been operated under mandatory segregation laws, but which had nevertheless acted in a way that helped create a racially segregative system. It is significant both as a major landmark in the continuing definition of the Equal Protection clause within the context of school desegregation that began with *Brown* v. *Board of Education,* 347 U.S. 483 (1954); and as an indication of the views and attitude of the present Supreme Court. It will of necessity have a major impact upon the future direction of the public school systems in the United States including the one in Dayton, Ohio.

The concurring opinion of Justice Powell must rank among the clearest and most logical expositions of a most troubling and difficult subject. This court proposes to follow the rationale set forth by Justice Powell. We place the burden upon the Board to comply to the fullest extent possible with the views stated therein. We place particular significance on the following statement of Justice Powell:

> "The Term, "integrated school system,' presupposes, of course, a total absence of any laws, regulations or policies supportive of the type of 'legalized' segregation condemned in *Brown.*
>
> "A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to: (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instructions and curricula opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; and (iv) locate new schools, close to old ones, and determine the size and grade categories with the same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind."

This Court likewise adopts as its guiding definition the following statement from Justice Powell:

> "An integrated school system does not mean, and indeed could not mean, in view of the residential patterns of most of our major metropo'itan areas, that *every school* must in fact be an integrated unit. A school which happens to be all or predominately white or all or predominately black is not a 'segregated' school in an unconstitutional sense if the system itself is a genuinely integrated one."

Keyes v. *School District No. 1, Denver, supra,* 41 U.S.L.W. at 5012.

Relating the standards established by Justice Powell to the Dayton situation, the Court has found that appropriate steps to integrate faculties and administration have been instituted and will be continued. There has been and there will be an increasing level of transportation of students for the purpose of promoting integrative opportunities through the Freedom of Enrollment priorities.

There is presently no evidence of a failure of equality of facilities, instructions and curricula opportunities nor has there been a persuasive proof that the Board, in recent times, drew attendance lines or built new facilities for the avowed purpose of minimizing integration. However, there has been evidence which indicates that the affirmative promotion of integration through these essential functions of the Board has not held an important place in the Board's priorities.

The Powell rationale will operate prospectively. The Board's planning and implementation units must become capable of and sensitive to the racial effects which flow from the drawing of attendance lines, the construction and improvement of school facilities and the assignment of faculty, staff and pupils. All of such actions must henceforth be examined for their "integration impact."

These are long range goals and a further opportunity should be given to the Dayton School Board in which to plan and implement them. Accordingly, while this Court is most reluctant to continue a "federal receivership" of the Dayton School System, see *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5022 (Rehnquist, J. dissenting), it would seem that a proper disposition of this problem requires a retention of jurisdiction while a reasonable period of time is given to the School Board for this purpose. Therefore, as to these long-range criteria, the Court will re-examine the Dayton School System at the end of academic year 1973-74 and determine, at that time, whether or not additional judicial action is required.

Nothing that we have said today should be interpreted as a repudiation of the neighborhood school concept. To the contrary, it is this concept which often represents the bedrock strength of the public school systems and steps may be properly taken to preserve it. See *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5018-5020 (Powell, J., concurring in part and dissenting in part); *Deal* v. *Cincinnati Board of Education,* 396 F.2d 55, 60 (C.A.6 1966). Where school lines in Dayton have been drawn without improper racial intent, they will be allowed to stand. Where they have not yet been drawn, as in the case of the still embryonic system of middle schools, they should be drawn in such a way as to maximize integrative goals.

The essential principle which guides this Court is a paraphrase from *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 at pages 15-16.

It is the function of the federal courts only to eliminate a deprivation of constitutional rights; it is the duty of local school boards to operate and maintain integrated school systems.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
United States District Judge

C. COURT OF APPEALS' AUGUST 20, 1974 OPINION.

(Filed August 20, 1974)

Nos. 73-1974-75

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK BRINKMAN, ET AL., *Plaintiffs-Appellants,* v. JOHN J. GILLIGAN, ET AL., *Defendants-Appellees.*	APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division.
MARK BRINKMAN, ET AL., *Plaintiffs-Appellees,* v. DAYTON BOARD OF EDUCATION, *Defendants-Appellants.*	

Before PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PHILLIPS, Chief Judge. This is a school desegregation case directed against the public school system of Dayton, Ohio. For the reasons set forth below, we affirm in part and remand the case to the District Court for further proceedings.

Plaintiffs-appellants are black and white Dayton parents who bring this class action on their own behalf, on behalf of their minor children, and on behalf of all others similarly situated.

In addition, the National Association for the Advancement of Colored People (NAACP) joined as a party plaintiff. The complaint named the Governor of Ohio, the Attorney General of Ohio, the Ohio State Board of Education, the Superintendent of Public Instruction of the Ohio Department of Education, the Dayton Board of Education, the six individual members of the Dayton Board and the Superintendent of the Dayton School District as parties defendants.[1] The Dayton Board of Education has cross appealed.

I. Chronology of Proceedings

In their complaint filed on April 17, 1972, appellants sought, *inter alia,* an injunction enjoining the Dayton defendants from continuing their allegedly unconstitutional policy of operating the public schools in Dayton in a manner that perpetuated racial segregation. The complaint further averred numerous racially discriminatory practices for which the State defendants had allocated educational resources.

The complaint was filed in the United States District Court for the Southern District of Ohio, Eastern Division, which is located at Columbus, Ohio, rather than in the Western Division at Dayton (the situs of the subject schools) on the basis that the State defendants were domiciled in Franklin County (Columbus). Motions to dismiss for failure to join necesary parties and for improper venue and alternative motions to transfer the action to the District Court at Dayton were filed by the State defendants, the Dayton Board of Education and three individual Dayton Board members. On June 22, 1972, the District Court overruled the motions to dismiss for improper venue and denied the motions to transfer, but did not

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[1] Hereinafter, the Governor, Attorney General, State Board of Education, and the Superintendent of Public Instruction will sometimes be referred to collectively as the "State defendants." Hereinafter, the Dayton Board of Education, its members, and its Superintendent sometimes will be referred to collectively as the "Dayton defendants."

rule on the motion to dismiss for want of necessary parties. Thereafter, on July 24, 1972, the Dayton defendants and the State defendants filed their answers denying the material allegations of the plaintiffs' complaint.

In accordance with the proposed order of procedure, an expedited hearing before District Judge Carl B. Rubin, was conducted from November 13 through December 1, 1972, limited to the single issue of whether the school system of Dayton was a segregated one by reason of acts of the Dayton Board of Education. On February 7, 1973, the District Court filed its Findings of Fact and Memorandum Opinion of Law in which it found that (1) racially imbalanced schools, (2) optional attendance zones, and (3) rescission by the Dayton Board of Education of three resolutions calling for racial and economic ba'ance in each school in the Dayton system were "cumulatively in violation of the Equal Protection Clause" of the Constitution. In its February 7, 1973, decision, the District Court ordered the Dayton Board to submit a plan which would (1) abolish all optional zones, (2) restate the priorities of the Board's Freedom of Enrollment program so that racial transfers would take precedence over curriculum transfers, (3) maintain faculty assignment practices so that each school would continue to reflect the approximate ratio of the total b'ack to white faculty in the Dayton system, and (4) establish hiring practices that would enable the clerical and maintenance personnel employed by the Board to approximate the proportion of black-to-white population existing within the Dayton system. The District Court further stated that the foregoing elements "shall be considered as a minimum" and that the plan to be submitted by the Board should otherwise conform in all respects to the requirements of law, citing *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971).

In compliance with the February 7, 1973, order of the District Court, the Dayton Board on March 19, 1973, submitted

a desegregation plan to the District Court. This plan contained eleven points which are summarized below:

I. Elimination of Optional Zones – eliminated optional attendance zones for elementary and high school students.

II. Freedom of Enrollment Priorities – revised the system's Freedom of Enrollment program in accordance with a specified set of priorities.

III. Faculty Assignment Practices – provided that faculty assignments for each school in the system should reflect the ratio of white to black faculty in the entire system.

IV. Hiring Policies for Classified Personnel – provided that blacks would be hired for classified positions, e.g. clerical, custodial and food service staff, to reflect the proportion of the black-to-white population residing within the Dayton School District.

V. Science Environmental Program – proposed the establishment of a city-wide elementary science program guided by a trained staff working at four centers. The program was to be mandatory and children were to be bused to produce a racial mix that approximates the ratio between black and white students in the system as a whole.

VI. Patterson-Stivers Vocational High School – combined two existing vocational schools into a new unified cooperative school with a district-wide attendance area.

VII. The Musical Stereopticon – formed an elementary and high school band orchestra and chorus on an all-city basis.

VIII. Integrated Athletics – required schools that have no minorities on their teams to schedule schools that do have minorities represented. High school schedules were to be administered by a central athletic office to insure that racial isolation did not exist.

IX. Minority Language Program — required all classroom teachers and administrators at the elementary school level to participate in a series of in-service workshops on linguistic differences that exist in American English.

X. Living Arts Center — created departments in art, creative writing, dance and drama to permit studets, teachers, and parents to expand their knowledge in these areas.

XI. Control Centers — created rumor control centers, school guidance centers, and area learning centers to create a more secure climate for quality education in the school system.

In addition to the plan submitted by the Dayton Board, separate plans were submitted to the District Court by the minority members of the Dayton Board and the Dayton Classroom Teachers' Association. The Board minority submitted its more comprehensive plan because it believed that the plan of the Board majority would maintain the status quo and hence did not comply with the February 7, 1973, order of the District Court to conform in all respects with *Swann, supra,* and *Davis supra.* Further, the plaintiffs-appellants filed objections to the plan of the Board majority primarily on the grounds that the majority plan "froze in" the present unconstitutional system of segregation and would fail to eliminate racialy identifiable schools when other alternative remedies, such as busing of children to other schools, were available.

On July 13, 1973, after considering the three desegregation plans before it, the District Court issued its Supplemental Order on Remedy. The District Court essentialy accepted the plan of the Board majority except that the Dayton Board was ordered to submit a freedom of choice plan for the Dayton high schools. The District Court, however, expressed its "disappointment at the limited nature of Points V through XI"

of the plan of the Board majority, and stated that the desired goal was not attained completely by the majority plan.

The District Court then stated:

> 'There remain for consideration two further questions which the Court has reserved: The matter of the so-called Metropolitan School District and the status of defendants State of Ohio through its Governor and the Ohio Department of Education.
>
> "The findings by the Court in its Order of February 7, 1973, and the disposition of the Board of Education's plan appear to moot the metropolitan question and to require the dismissal of these non-Dayton defendants. Plaintiffs are hereby granted thirty (30) days within which to file memoranda on either or both of these questions. Defendants are granted thirty (30) days from the date of such filing to file answer memoranda and plainiffs are granted thirty (30) days from defendants' filing to file reply memoranda. An evidentiary hearing will be granted upon either of such questions upon the showing of a need therefor."

The District Court concluded its July 13, 1973, order as follows:

> "Nothing that we have said today should be interpreted as a repudiation of the neighborhood school concept. To the contrary, it is this concept which often represents the bedrock strength of public school systems and steps may be properly taken to preserve it. See *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5013-5020 (Powell, J., concurring in part and dissenting in part); *Deal* v. *Cincinnati Board of Education,* 396 F.2d 55, 60 (C. A. 6 1966). Where school lines in Dayton have been drawn without improper racial intent, they will be allowed to stand. Where they have not yet been drawn, as in the case of the still embryonic system of middle schools, they should be drawn in such a way as to maximize integrative goals.

"The essential principle which guides this Court is a paraphrase from *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 at pages 15-16.

"It is the function of the federal courts only to eliminate a deprivation of constitutional rights; it is the duty of local school boards to operate and maintain integrated schools systems."

Following the July 13, 1973, order of the District Court, the plaintiffs-appellants in a letter dated July 26, 1973, reminded the District Court that by its own order of procedure evidence with respect to the metropolitan and state aspects of the controversy had been excluded from the earlier hearing. On August 10, 1973, the Dayton Board submitted a revised plan incorporating the court's freedom of choice plan for the Dayton high schools. The plaintiffs-appellants filed their notice of appeal from the two orders of the District Court on July 23, 1973. The Dayton Board cross appealed from those orders on August 13, 1973.

Thereafter, on September 25, 1973, the Dayton Board moved this court to dismiss the pending appeal of the plaintiffs-appellants for want of jurisdiction on the ground that no final order had been entered by the District Court. In an unreported order filed on January 17, 1974, this court denied the Dayton Board's motion to dismiss, saying:

"Said motion to dismiss is hereby denied, it appearing to the court that the District Judge's supplemental order on remedy, dated July 13, 1973, approves a proposed desegregation plan with added instruction as to how it is to be carried into effect, and hence, appears to be in the nature of a temporary injunction under 28 U.S.C. § 1292(a)(1) (1970)."

We have heard oral arguments and the case is now before the court for decision.

II. Historical Background of School Segregation in Dayton

Ohio law has long mandated an integrated public school system. Ohio Revised Code, § 3313.48, provides in relevant part:

"The board of education, of each city, exempted village, local, and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof."

This has been the law of Ohio since February 22, 1887, when it was enacted by 84 Ohio Laws 34. That statute was upheld by the Supreme Court of Ohio in 1888 in *Board of Education* v. *State,* 45 Ohio St. 555, 556, 16 N.E. 373, in which the court stated:

"[S]ection 4008 having been repealed by the act of the general assembly passed February 22, 1887 (84 Ohio L. 34), separate schools for colored children have been abolished and no regulation can be made under section 4013, that does not apply to all children irrespective of race or color."

Further, the District Court made the following historical determination, that is not challenged on appeal, as a finding of fact:

"(1) The evidence presented has established isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system. Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in high schools in the 1930's and 1940's and the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference." (Footnotes omitted.)

The physical segregation into separate buildings of pupils and teachers by race was ruled illegal in *Board of Education of School District of City of Dayton v. State, ex rel. Reese*, 114 Ohio St. 188, 189, 151 N.E. 39 (1926).

In 1956, following *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Ohio Attorney General ruled that the Ohio State Board of Education had the primary responsibility for administering the laws relating to the distribution of state and federal funds to local school districts and that such funds should not be distributed, absent good and sufficient reasons, by the State Board to local school districts which segregated pupils on the basis of race in violation of *Brown*. Despite protests over the past twenty years from the Dayton branch of the NAACP and others, the Dayton Board has maintained a system wherein the great majority of schools today have student populations which are racially imbalanced. The State Board of Education has permitted this system to continue with a steady flow of state and federal money.

On March 17, 1969, the Acting Director of the Office for Civil Rights, United States Department of Health, Education and Welfare (HEW), notified the Dayton School authorities that, as a result of a compliance review conducted by federal officials, his office had concluded that the Dayton school district was not complying with Title VI of the Civil Rights Act of 1964. In particular, the Acting Director stated:

> "An analysis of the data obtained during the review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff. Thus, all Negro principals are assigned to predominantly Negro schools, as are 11 of the 14 Negro assistant principals; 156 out of 181 Negro high school teachers are assigned to schools where Negroes constitute 92 percent of the total enrollment. Over 85 percent of the Negro elementary teachers instruct in schools having a preponderence of Negro pupils, and only 14 percent of teachers

> of the white race are in schools where Negroes are in the majority. The assignment of counsellors and coaches follows a similar pattern.
>
> "The existence in your district of a substantial duality in terms of race or color with respect to distribution of pupils in the various schools, is a matter of concern to us. The fact appears to be that of a total of 5,627 Negro high school pupils, approximately 85 percent are concentrated in 3 high schools in which the percentage of Negro attendence ranges from 92.3 percent to 100 percent. Similarly, 15,479 (approximately 85 percent) Negro elementary pupils attend 20 out of the 53 elementary schools in your district. It is noteworthy that in 17 of these 20 schools, Negroes constitute 90-100 percent of the total enrollment.
>
> "Our review also indicates that students at Roosevelt High School are not afforded the same educational opportunity as other students in your system."

On June 7, 1971, the Ohio State Department of Education presented a series of recommendations to the Dayton Board on how to achieve constitutionally required desegregation. In its letter conveying the recommendations, a State Department of Education report stated:

> "As the resolution of April 29, 1971 (of the Dayton Board), admitted, 'the Dayton Board of Education recognizes that unequal educational opportunities for minority students now exists.' Inequality of such opportunities, for minority *and* majority students, has characterized the Dayton public school system throughout its history.
>
> "Since the Board, *as an agency of state government*, has created the inequality which offends the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative

duty to comply with the Constitution; that is, as the Supreme Court has stated, 'to eliminate from the public schools all vestiges of state-imposed segregation.'"

In particular, the State Department report was especially critical of the process of conversion to feeder and middle schools, stating that the following seemed to be occurring:

"1. two sets of schools will be totally black;

"2. racial isolation will actually be increased in one set of schools; and

"3. only in the Dayton View area, which was previously integrated, could conversion to middle schools possibly result in reduction of racial and economic isolation and insulation.

"If what appears to be happening with middle schools is in fact happening, then Dayton has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur."

Although the recommendations of the State Department were not complied with in full, the State Board of Education continued to aid in financing the operation of Dayton schools.

Finally, pursuant to the resolution of the Dayton Board passed at its April 29, 1971, meeting, the President of the Dayton Board appointed a broadly representative committee to evaluate and advise the Board on plans to reduce racial isolation and improve educational opportunities in Dayton. This committee became known as the Committee of 75, although its membership was later expanded to include eleven students. At its first meeting, on August 30, 1971, the Committee was charged as follows by the Board President:

"We recognize, and the statistical data substantiates, the fact that unequal educational opportunities for the poor and black students now exist in the Dayton School District. The Board of Education has gone on record by setting quality integrated education as its goal. We have admitted that the district is guilty of procedures which have led to the racial isolation of school children.

"It is this committee's responsibility to establish the evaluation elements to be applied to a developed plan or plans and advise the Dayton Board of Education accordingly. We do hope that you would set up guidelines and/or methods by which the community will become meaningfully involved.

"You are an arm of the Dayton Board of Education with the task of supplying input to the Board. It remains the responsibility of the Board of Education to make official approval of your point. We feel very strongly that the establishment of this committee is not an attempt to abdicate its responsibility or delegate its authority, but rather an attempt to utilize the enrichment of citizen participation. It is hoped that the school councils, and organized groups of school-oriented citizens of the school district, will be an avenue you may use for additional participation.

"If there be a fear that you are here to architect a master plan for 'busing' — 't'ain't true.' You are here in an attemp to supply your input of the ingredients for excellency to any plan that the administration and/or consultants may recommend. It is our sincere hope that when a plan is set for implementation, it should be that one or the one that embraces the wishes of the citizens of the Dayton School District and not one imposed by federal, state or court mandate."

After several months of study, the Committee of 75 issued its report in the late fall of 1971. The report recognized the

Dayton Board's casual responsibility for the condition of segregation and the imperative need to end one race schooling, and suggested the following tentative approaches to accomplish desegregation in the Dayton school system:

"1. Segregated education, because it perpetuates and condones economic and racial isolation, is both illegal and inferior.

"2. The school children of Dayton have suffered far too long under the crippling handicaps imposed by racial and economic isolation.

"3. We must resolve now as a total community to end inferior segregated education once and for all.

"4. Time is running out. Unless we act now the divisions generated by segregation will destroy us. Unless we act now court orders may impose upon us what all of us will regret.

"5. Initiative in the struggle against segregated education belongs to the Dayton Board of Education. We cannot wait for housing and job patterns to change while we defy the law of the land.

"6. To lift the plague of segregated education in Dayton immediate appeal must be addressed to the school systems surrounding Dayton as well as to the appropriate state and national agencies involved.

"7. Desegregation is not enough. To end racial and economic isolation we must not rest until we have achieved true integration, until the differing ethnic and racial groups among us are able to live side by side in mutual respect.

"8. The personal cost of achieving such true integration will be high because to achieve such integration we must persist in dialogue until the differences that divide us have been resolved. We can no longer allow the fear of busing (to) stifle such dialogue.

"9. The financial cost of true integration will also be high. At least 1 per cent of the current budget, exclusive of federal and state grants, should be allocated to this sector.

"10. Integrated quality education requires constant vigilance. We must not only develop support systems to undergird every group involved in the changes proposed but we must nurture these groups by continuing attention to curricula, buildings, and in-service training."

The report of the Committee of 75 concluded as follows:

"*Summary.* The presence and magnitude of the problem before us needs to be recognized by all the citizens of Dayton. Quality integrated education can help stop the flight to the suburbs, break the cycle of poor education, and the lack of job skills which handicap the minorities. The cost of this type of education will be small in relation to the total benefits society will reap."

Thereafter, at its regular meeting on December 8, 1971, the Dayton Board of Education passed three resolutions in response to the report of the Committee of 75. The first resolution provided, in part, as follows:

"WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

"NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

"1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design

of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Dayton metropolitan area and other parts of Ohio; and the actions or inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

"2. That this Board recognizes that past actions or inactions of the Board of Education and residential racial segregation are interdependent phenomena.

"3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

"4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society."

The second resolution passed by the Dayton Board at its December 8, 1971, meeting requested the assistance of the state and federal governments in desegregating Dayton public schools. The third resolution declared the Board policy to be that each school in the system should enroll pupils in a manner

which substantially reflected the racial and economic characteristics of the district as a whole and directed the school superintendent to implement a plan of desegregation according to the following guidelines:

"a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

"b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

"c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

"d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

"e. Desegregation is to be completed by September, 1972.

"f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criteria in c. above.

"g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy."

Each of the three Board resolutions passed by a 5 to 2 vote after a motion to table the resolution had failed by a 4 to 3 vote.

Subsequently, on January 3, 1972, the newly constituted Dayton Board, the composition of which had been changed by the local elections of November 1971, officially rescinded the three resolutions passed by the prior Board at its December 8, 1971 meeting. The rescission of the three resolutions occurred by votes, respectively, of 4 to 3, 4 to 2, and 4 to 2. The effect of the rescissions was to reinstate the existing attendance zones and the system's Freedom of Enrollment program for

the 1972-73 school year. The present action was filed on April 17, 1972.

III. The Constitutional Violations Found by the District Court

The District Court found three constitutional violations in the Dayton school system, namely, (A) racially imbalanced schools, (B) optional attendance zones, and (C) the Dayton Board's rescission of the three resolutions. These were held by the District Court to be "cumulatively in violation of the Equal Protection Clause." Further, the District Court stated that the rescission of the resolutions "constituted an independent violation" of the constitutional rights of the black minority in Dayton.

We hold that the findings of fact on which the District Court based its conclusion of a cumulative violation are not clearly erroneous but, to the contrary, are amply supported by the evidence. Fed. R. Civ. P. 52(a). However, we do not pass upon the question at the present time as to whether the rescission of the Board resolutions in and of itself constituted an independent violation of the Constitution.

(A) Racially Imbalanced Schools

The District Judge made the following finding of fact:

> "The great majority of all schools in the Dayton system today have student populations which are racially imbalanced, consistent with the black-white population and geographical distribution thereof as shown by the 1970 census. Except at the Patterson Co-op High School, where in the past few years a concerted effort has been made to enroll more black students, no effort has been made by the school board of Dayton to balance by race the student population at any particular school." (Footnote omitted.)

With respect to this finding of fact, the District Judge appended the following chart which graphically demonstrates the racial imbalance in Dayton's sixty-eight public schools.

RACIAL COMPOSITION OF DAYTON PUBLIC SCHOOLS (1971-1972)

Elementary schools — % Black:

1.	Jane Addams	81.7	27.	Jackson Primary	98.8
2.	Allen	0.6	28.	Jefferson Ele.	60.1
3.	Belle Haven	5.0	29.	Jefferson Primary	57.1
4.	Belmont	0.8	30.	Kemp	0.0
5.	Brown	0.6	31.	Lewton	0.0
6.	Carlson	99.0	32.	Lincoln	0.0
7.	Cleveland	0.0	33.	Loos	4.6
8.	Drexel	5.7	34.	Horace Mann	0.2
9.	Eastmont	0.0	35.	McGuffey	14.4
10.	Edison	97.3	36.	McNary Park	99.4
11.	Emerson	6.8	37.	Meadowdale Ele.	8.0
12.	Fairport	0.1	38.	Miami Chapel	99.9
13.	Fairview Ele.	1.7	39.	Patterson-Kennedy	0.0
14.	Ft. McKinley	0.0	40.	Residence Park Ele.	98.8
15.	Franklin	0.0	41.	Residence Park Pri.	99.3
16.	Gardendale	28.5	42.	Ruskin	7.0
17.	Gettysburg	5.2	43.	Shiloh	0.1
18.	Gorman	21.1	44.	Shoup Mill	7.1
19.	U.S. Grant	0.1	45.	Louise Troy	100.0
20.	Grace A. Greene	96.8	46.	Valerie	7.5
21.	Hawthorne	0.0	47.	Van Cleve	1.1
22.	Hickorydale	6.6	48.	Washington	19.4
23.	Highview	97.0	49.	Weaver	99.9
24.	Huffman	0.0	50.	Webster	0.0
25.	Irving	99.0	51.	Westwood	99.4
26.	Jackson Ele.	99.1	52.	Wogaman	100.0

Of 52 elementary schools in use as of September, 1972, 29 are more than 90% white and 15 are more than 90% black. The balance range from 19.4% to 60.1% black.

Middle Schools – % Black:

1.	MacFarlane	99.6
2.	Whittier	99.3
3.	Cornell Heights ...	80.5
4.	Longfellow	64.1
5.	Orville Wright	8.1

High Schools – % Black:

1.	Dunbar	100.0
2.	Roosevelt	100.0
3.	Roth	95.8
4.	Colonel White	54.6
5.	Patterson Co-op ..	32.9
6.	Fairview	24.1
7.	Stivers	14.0
8.	Meadowdale	10.6
9.	Kiser	9.8
10.	Wilbur Wright	9.2
11.	Belmont	5.2

Enrollment data from the Dayton system reveals the substantial lack of progress that has been made over the past 23 years in integrating the Dayton school system. In 1951-52, of 47 schools, 38 had student enrollments 90 percent or more one race (4 black, 34 white). Of the 35,000 pupils in the district, 19 per cent were black. Yet over half of all black pupils were enrolled in the four *all* black schools; and 77.6 per cent of all pupils were assigned to virtual one race schools. "Virtual one race schools" refers to schools with student enrollments 90 per cent or more one race. In 1963-64, of 64 schools, 57 had student enrollments 90 per cent or more one race (13 black, 44 white). Of the 57,400 pupils in the district, 27.8 per cent were black. Yet 79.2 per cent of all black pupils were enrolled in the 13 black schools; and 88.8 per cent of all pupils were enrolled in such one race schools.

In 1971-72 (the year the complaint was filed), of 69 schools, 49 had student enrollments 90 per cent or more one race (21 black, 28 white). Of the 54,000 pupils, 42.7 per cent were black; and 75.9 per cent of all black students were assigned to the 21 black schools. In 1972-73 (the year the hearing was held) of 68 schools, 47 were virtually one race (22 black, 25 white); fully 80 per cent of all classrooms were virtually one race. (Of the 50,000 pupils in the district, 44.6 per cent were black).

Every school which was 90 per cent or more black in 1951-52 *or* 1963-64 *or* 1971-72 and which is still in use today remains 90 per cent or more black. Of the 25 white schools in 1972-73, *all* opened 90 per cent or more white and, if open, were 90 per cent or more white in 1971-72, 1963-64 and 1951-52.

(B) Optional Attendance Zones

The District Judge made the following finding of fact:

"(11) The Board of Education of the Dayton School District has from time to time created optional zones. Optional zones are dual or overlapping attendance areas which allow children residing within them a choice among two or more schools. Some optional attendance zones were created where the more distant school geographically had better access; some were created where the more distant school did not require the crossing of busy intersections, commercial areas, or railroad tracks. Many were created for the convenience of parents. There has been evidence that at times this last concept embraced desires motivated by racial considerations. Seven optional elementary zones and four optional high school zones exist at the present time. All of the others have been abolished.

"The majority of optional zones had no racial significance at the time of their creation. The Westwood-Jackson, Roosevelt-Colonel White, and Fairview-Roth

zones may have constituted exceptions to this general rule and we cannot conclude that these did not have adverse racial effects. Similarly, although none of the elementary school optional zones today have any significant potential effects in terms of increased racial separation, the same cannot be said of the high school optional zones. Two of these zones, those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past."

The testimony of Dr. Gordon Foster, Director of the Florida School Desegregation Consulting Center at the University of Miami, indicates that the Colonel White-Roosevelt optional attendance area is almost a classic example of segregation practice:

"Q Dr. Foster, with reference, first of all, to the option attendance zones, you described certain effects.

Are there short term as well as long term effects of the ultilization of optional attendance zones?

"A Yes. In the ones we talked about at the high school level, if we can cite the Roosevelt-Colonel White optional zone, and the following Colonel White-Kiser optional zone, the short term effect it seems to me is to allow whites to move out of a school assignment that is becoming black, and I should point out that this is not to say that in many cases that at a certain point blacks also take advantage of this option.

"In the Colonel White-Kiser situation, for example, as Colonel White has become blacker, we are at the point where there are no whites apparently opting now to go to Colonel White."

Further testimony of Dr. Foster demonstrates the deleterious effect that the optional attendance zones had on school integration in Dayton:

"Q In what way do optional attendance areas affect desegregation and the stability of pupil assignment to particular schools?

"A. Well, essentially in my opinion they create instability in the public in one way in terms of housing choices where there are choices and in terms of perception of whether a school is going black or staying white, this sort of thing, so that generally where you have an optional zone which has racial implications, you have an unstable situation that everybody realizes is in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation.

"Q. The optional attendance zones which you have identified in your testimony today, what is your opinion with respect to the effect or if there is any effect on racial composition of schools in Dayton?

"A. Well, in my opinion, these accelerated and precipitated further segregation, and in those cases where I was able to cite hard figures, I think that is very definitely borne out, and I have no reason to believe that in all the other cases the same thing was true although I can't cite actual pupil figures from year to year because they simply aren't available."

We conclude that the District Court correctly found that the optional attendance zones used in Dayton were an element of the cumulative violation of the constitutional rights of the appellants.

(C) Rescission of the Board's Resolutions

The District Judge rendered the following as a finding of fact:

"At the general election in November, 1971, the electors of the school district of Dayton elected three members for a four year term commencing January 1, 1972. Issues

at such election involved the matter of school attendance zones and transportation of pupils. Two incumbent members of the Board ran for reelection, one did not. One incumbent was relected and two new members of the Board were added. On December 8, 1971, the 1971 Board met to consider resolutions dealing with transportation of students and zone attendance lines. All members present were duly elected, qualified and acting members of the Board, although two of them were so-called 'lame ducks,' who would not be members of the Board after December 31, 1971.

"The Board adopted several resolutions. These resolutions recognized the existence of racial segregation in the Dayton schools, the role played by the Board in the creation of the racial patterns and the concommitant responsibility of the Board to eradicate these patterns through affirmative action. The types of affirmative action recognized included the elimination of the old attendance zones and the transportation of students for the purpose of achieving the city-wide racial balance of students. . . .

"Immediately thereafter, one member of the Board who had voted with the majority, requested reconsideration and was improperly ruled out of order. The Board met subsequently on December 6, 1971 [sic], and January 3, 1972. At the end of the latter meeting, the Board ended its term of office and the 1972 Board took its place. On January 3, at its first meeting, the 1972 Board rescinded the resolutions passed on December 8. Since the 1971 Board had passed out of existence, the action of the 1972 Board on January 3, 1972, was not in the nature of a reconsideration but instead was a rescission of the previous action."

From this finding of fact, the District Judge concluded:

"The right of the majority to override protected minority rights has clear limitations in our constitutional democracy. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); also see *Alkire* v. *Cashman*, -- F.Supp. -- (S.D. Ohio E.D. 1972). The rescission in early 1972 of the resolutions adopted by the 1971 School Board constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton. See *Bradley* v. *Milliken*, 433 F.2d 897 (C.A. 6 1970); *Oliver* v. *Kalamazoo Board of Education*, 346 F.Supp. 766 (W.D. Mich. S.D. 1971), *aff'd*. 448 F.2d 635 (C.A. 6 1971)."

The passage of the three resolutions and their subsequent rescission by a Board of a different composition are factual matters about which there is no dispute. As hereinbefore stated, the record amply supports the District Judge's findings that racially imbalanced schools and optional attendance zones were elements of the cumulative violation of the appellants' constitutional rights. Accordingly, when the Dayton Board at its December 8, 1971, meeting passed resolutions designed, among other things, to eliminate racial imbalance and optional attendance zones in Dayton schools, it was acting in a manner consistent with its constitutional duties. Therefore, the rescission by a subsequent Board of these resolutions designed to carry out the Board's constitutional duties was an element of the cumulative violation of the appellants' constitutional rights as guaranteed by the Equal Protection Clause of the Constitution.

The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf. *Hunter* v. *Erickson*, 393 U.S. 385 (1960); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution.

In view of our conclusion in this case that the rescission was a part of the cumulative violation of appellants' constitutional rights, we find it unnecessary to pass on the question of whether the rescission by itself was a violation of those rights.

We affirm the District Court's holding that racially imbalanced schools, optional attendance zones, and the Board's rescission of the three resolutions are cumulatively in violation of appellants' rights guaranteed by the Equal Protection Clause.

IV. Other Alleged Constitutional Violations

On appeal, the appellants raise at least four other school practices which purportedly maintained and expanded the basically dual school system inherited at the time of *Brown*. These practices are in the areas of (A) staff assignment, (B) school construction, (C) grade structure and reorganization, and (D) transfers and transportation. The District Judge did not include any of these practices within his finding of cumulative violation of the appellants' constitutional rights.

(A) Staff Assignment

The record reveals that prior to the 1951-52 school year the Dayton Board basically assigned all black teachers only to schools with all black pupils and all white teachers to schools with predominantly white student bodies pursuant to an explicit segregation policy of the Board. In 1951-52, the Board introduced a new policy ostensibly to integrate the faculties, but which effectively continued in practice the racial assignment of faculty through the 1970-71 school year.

In a letter dated March 17, 1969, the Acting Director of the Office of Civil Rights of HEW notified the Dayton Board that "an analysis of the data obtained during the (compliance) review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff."

Other relevant portions of this letter are contained in Section II of this opinion. Following receipt of the letter, the Dayton Board negotiated with HEW and agreed to desegregate its staff so "that each school staff throughout the district will have a racial composition that reflects the total staff of the district as a whole" in accordance with the principles of *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). Thereafter, the Dayton Board realigned its school staffs for the 1970-71 school year.

The appellants admit that progress has been made with respect to eliminating segregative staff assignment, but allege that the agreement with HEW has not been fulfilled in that vestiges of the former practices persist which continue to identify schools as "black schools" or "white schools." As an example, at the high school level, the following table was presented by the appellants to demonstrate how Board assignment of its professional staff still served to identify schools as "black schools" or "white schools" in 1971-72 (w means white, b means black):

	Pupil % Black	*Faculty % Black*	*Principal*	*Coaches*
Belmont	5.2	23.1	w	10w, 2b
Wilbur Wright	9.2	28.5	w	10w, 3b
Kiser	9.8	20.1	w	10w, 2b
Meadowdale	10.6	23.5	w	13w, 3b
Stivers	14.0	32.4	w	10w, 4b
Fairview	24.1	29.8	w	10w, 5b
Col. White	54.6	32.0	w	9w, 6b
Roth	95.8	43.5	b	9w, 7b
Roosevelt	100.0	47.4	b	8w, 8b
Dunbar	100.0	50.3	b	7w, 9b

The witness Dr. Robert L. Green, Dean of the Urban College and Professor of Educational Psychology at Michigan State University, testified as follows:

"Q. Dr. Green, I believe I informed you that the faculties were desegregated as a result of HEW action in 1970.

"Do you have an opinion as to whether or not the effects of this history of faculty assignment persist in terms of identification of schools as black or white in the school district after the changing of the faculties as was done in this case?

"MR. GREER: Objection, your Honor.

"THE COURT: Overruled.

"A. Yes. The answer is yes, Mr. Lucas. When there has been historical practice of p'acing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentially uni-racial or predominantly black or predominantly white.

"Q. Dr. Green, you did examine the '68-'69 statistics for the Dayton School System, is that correct?

"A. Yes.

"Q. And did you in examining the data note any correlation between the pupil composition of black or white and the faculty composition black or white?

"A. Yes, I did, Mr. Lucas.

"Q. Do you have an opinion whether this is isolated instances of correlation or is there any systematic pattern to it?

"A. There seems to be a systematic pattern as it relates to black teachers and the racial composition of schools vis-a-vis black youngsters and white youngsters being essentially placed in schools that are predominantly white."

The witness Dr. Foster testified as follows:

"Q. . . . In light of that history, could you give us your opinion as to the effect, first of all, of that policy before the change, in terms of identification of schools as black or white and the effects of that change on the present situation in the Dayton School System?

"MR. GREER: Objection.

"THE COURT: Overruled.

"A. Well, my opinion is that this policy and practice before the change we assume took p'ace, especially since it is in a northern district, wou'd indicate that the Board is missing or has missed a golden opportunity to prove that it does want to run a unitary system and remove segregation practices insofar as it is able, because the Board clearly, as I understand it, under most State laws, or all State laws, can assign teachers willy-nilly in the System wherever they want to. This is not a free choice matter.

"Q. Is it also an annual option that the school Board has?

"A. Yes, in terms of assignment. In terms of my opinion on what this does, as recently changed, assuming this, I would have to say that this does not remove by any means the vestages of a segregated system since it is only one component of several important aspects of a system segregated or desegregated. I think it is a very important component, and I think it is a step certainly in the direction of desegregation, and a very positive step.

"But coupled with the other most important step of pupil assignment, so long as the schools themselves remain segregated, as they certainly do at this time in my opinion in Dayton, then the fact that teachers or staff being desegregated, if we assume that doesn't carry near the weight it would if the total desegregation process had taken place."

Dr. Wayne M. Carle, Superintendent of Schools in Dayton at the time of the trial, testified as follows:

"BY MR. LUCAS:

"Q. Would you answer my preliminary question, then. Did you agree with the HEW conclusion that there was purposeful faculty and staff segregation in the Dayton School System?

"MR. GREER: We would object to this, your Honor, as it simply asks a self-serving conclusion of the witness.

"THE COURT: I am going to overrule your objection. You may answer.

"A. There is no question but what that was so.

BY MR. LUCAS:

"Q. Now, Doctor, I think you stated that there had been substantial faculty desegregation. Has there also been staff desegregation and, if you will, limit it to what you have defined as line personnel, principals, assistant principals?

"A. There has been considerable desegregation of administrative staff, but there still is a high correlation between the race of pupils and the race of the administrator.

* * *

"Now, today the percentage of black administrators is around 32 or 33 percent, as I recall. That indicates less discrimination in promotion, since there is more relationship between the percentage of teachers, which now is perhaps 34 or 35 percent, and administrators. But I am saying that with respect to their assignment, and particularly at the high school level, there is an almost perfect correlation between the race of the principal and the predominating race in the school. All four black high schools, for example, have black principals. All the other high schools have white principals. So that that considerable vestige of segregation still has not been eliminated. There would be other instances, if you just scan the statistics, in which previously all black or nearly black staff similarly have weighted errors in them, that

is, the error is still in the direction of the previous discrimination. If the staff previously were 70 percent and now should be, let's say, 30 percent black, it may still be 40 percent because of difficult factors in resolving it.

"In all cases, or probably in all cases, that error or that difference is still weighted to the previously fully segregated pattern, so that it is very difficult I think, to understand the depth of segregation. It is so pervasive that its vestiges are difficult. These are two areas in which that is very obvious."

(B) School Construction

The District Judge did not include the Dayton Board's school construction practices within the cumulative violation because he found the underlying motives behind such construction to be racially neutral, rendering the following as a finding of fact:

"(c) Site selection and construction

"(9) Since 1954 the school board of Dayton has constructed 14 new elementary schools and 69 elementary school additions. The construction follows the pattern of growth in the Dayton area and follows the specific policy of 'building schools where children are, or where they are expected to be.' New construction of elementary schools are largely on the periphery of the center city. There are instances of errors in Board planning in that some areas have not developed as expected and other developed areas have not become part of the Dayton School District, as expected. There are examples of schools operating substantially below capacity. While reasonable minds might reasonably differ on selection and construction of some schools, sufficient evidence has not been presented that school construction was segregative in nature other than to provide schools in white neighborhoods which remain predominately white and schools in black neighborhoods which remain predominately black.

"(10) Five new high schools and fourteen high school additions have been constructed in the past eighteen years. Construction of some high schools followed the pattern of construction of elementary schools in that sites selected were away from the center of the city and in neighborhoods which were predominately white. Other sites could have been selected near the center of the city in black neighborhoods. Such schools would arguably, at least, have had a larger proportion of whites attending such schools.

"Site selection is a matter of judgment and no evidence has been presented that the Board of Education failed to use neutral criteria in its choices. In the construction of schools, the Board, over the years, has been presented with options. Plaintiffs have failed to sustain their burden of showing that the defendant Board exercised those options presented in an improper fashion."

On appeal, the appellants contend that there is substantial evidence in the record to support their claim that the Dayton Board's practices in school construction had a segregative effect and contributed substantially to the alleged present duality in pupil assignment. The record reveals that in the period of greatest expansion of the Dayton school system, from the late 1940's to the mid 1960's, the great majority of new schools and additions were located by the Board in either virtually all black or all white areas. Of 24 new schools constructed between 1950 and the present, 22 opened 90 per cent or more black or white. The following table contains some examples:

High Schools	*Date of Opening*	*% Black at Opening*	*% Black Pupils 1972-1973*
Patterson	1954	0.0	32.9
Belmont	1956	0.0	5.2
Meadowdale	1960	0.0	10.6
Dunbar	1962	92.3	100.0

Elementary Schools			
Orville Wright	1952	0.0	8.1
Miami Chapel	1953	100.0	99.8
Horace Mann	1954	0.0	3.1
Bell Haven	1954	0.0	17.1
Hickorydale	1957	0.0	32.5
Meadowdale Elem.	1957	0.0	12.6
Louise Troy (Primary)	1957	100.0	99.1
Shoup Mill	1958	0.0	3.8
Carlson	1958	95.0	99.0
Jackson Primary	1960	99.9	99.7
McNary Park (Primary)	1964	100.0	100.0
Res. Park (Primary)	1966	96.5	100.0
Valerie	1966	0.0	24.0

On the issue of school construction practices, Dr. Foster testified as follows:

"Q. Dr. Foster, would you at this point tell me if you made an inquiry into the question which I think related to the construction issues of site selection?

"A. Yes.

"Q. And what was that inquiry?

"A. In terms of the use of site selections to maintain segregation, in the new construction sites from 1950 which we have already discussed to the present, many of these have helped to promote and to impact and lock in segregated or isolated situations either in the inner city or in the suburbs, and I think this is true in terms of both school segregation and housing segregation, that is, in terms of its effects. First of all, in the area of the white suburban expansions which are farthest from the center of the city which is all black, and these were, of course, more inaccessible at the time of construction than they are now. We have Valerie which was built in 1966 which is almost at the extreme north of the district. We have Meadowdale High School built in 1960 and Meadowdale Elementary built in 1957 to the north of

the district. We have Shoup Mill built in 1958 and to the nearly extreme north. The south and east of the furthest white suburban expansion, we have Eastmont, on the extreme east built in 1965. We have Wilbur Wright to the northeast built in 1952, Horace Mann to the southeast built in 1954, and Belmont High School in the southeast built in 1956.

"Now, contrary-wise, in the inner city during this time there were a couple of examples of schools which were built into locked-in situations in terms of segregation, and in fact these schools were surrounded by other schools which were all black. That would be McNary in 1964 and Jackson Primary in 1960.

"Q. Dr. Foster, in your experience, use of the primary unit in close proximity to elementary schools, has this been a matter reflective of segregation practices in your experience?

"A. Yes. It is in a sense very much nothing more than an addition. They are on the same campus and for all practical purposes they are really one school.

"Q. What effect does this have on the existing racial concentrations?

"A. Well, it tends to secure it and to further insure that those schools are going to remain segregated and that the system as a whole is going to remain segregated."

Based on this evidence, the appellants dispute the District Court's conclusion that the Dayton Board's school construction practices were not a part of the cumulative violation. The appellants contend that on facts similar to those presented in this case the Supreme Court in *Swann, supra*, 402 U.S. at 20-21, found major constitutional violations on which a District Court could fashion a remedy.

(C) Grade Structure and Reorganization

The appellants' primary objection in this area is to the establishment of a middle school system in the 1971-72 school

year which allegedly had a segregative effect. Dr. Foster testified as follows:

> "My conclusion is that the establishment of the middle schools in 1971 resulted in the establishment of four out of five schools that were clearly racially identifiable, therefore, increasing or maintaining segregation as opposed to availing the opportunity of decreasing it."

Further, after the establishment of the new middle school structure, the Ohio State Department of Education gave the following advice to Dayton school authorities:

> "If what appears to be happening with middle schools is in fact happening, then Dayton has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to school children. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur."

The District Court found that the boundaries established for the middle schools in September 1971 had "neither segregative nor integrative effect." The appellants submit that this finding means, under applicable legal standards, that the Board acted unconstitutionally to maintain segregation in the face of an opportunity to accomplish substantial desegregation. The appellants assert that the action of the Dayton Board was intentional because the Board was aware of desegregation alternatives but instead choose a plan whose predictable impact was not to further integrate the Dayton school system.

(D) Transfers and Transportation

Finally, the appellants contend that transfer and transportation practices of the Dayton Board, which might have held promise to accomplish further desegregation, have operated to maintain segregation and further earmark schools as "black"

or "white." In support of this contention, the appellants cite evidence that curriculum, hardship and disciplinary transfers have operated frequently to assign white children from "black schools" to "whiter schools" and black children from "white schools" to "blacker schools." Further, there is evidence in the record revealing that the Board assigned tuition pupils from outside the district on a dual basis; white pupils were assigned to white schools and black pupils were assigned to black schools.

The testimony of John Harewood, Assistant Superintendent of Dayton schools in charge of administration, reveals two instances in which children were bused "intact" with the effect of segregating children on a racial basis in separate classrooms within schools. In 1963, white children from Ruskin School were transported intact to separate classes in the mixed Central School. In the spring of 1968, some of the black children from Edison School, which had been partially destroyed by fire, were similarly segregated within a number of white schools throughout the city.

The District Court's only conclusion in the area of transfer and transportation practices was with regard to the school system's Freedom of Enrollment program. The District Court required that program be revised for Dayton high schools so that transfers for purpose of improving racial balance take precedence over curriculum transfers.

On the basis of the evidence adduced, the appellants' legal argument in this area is that the transfer and transportation practices of the Dayton Board had the "clear effect of earmarking schools according to their racial composition" which is proscribed by *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 202 (1973).

(E) Conclusion as to Other Alleged Constitutional Violations

As hereinabove indicated in Section IV of this opinion, the appellants have raised serious questions with respect to whether the District Judge's failure to include these four school practices within the cumulative violation was supported by substantial evidence. In view of our holding in Section V hereof, we conclude that it is unnecessary at this stage to pass on whether the District Judge's findings of fact with respect to these four school practices is supported by substantial evidence.

V. Remedy

As more fully described in Section I hereof, the District Court ordered the Dayton Board of Education to submit a desegregation plan that conformed to all requirements of law. Subsequently, the four-member majority of the Dayton Board submitted an eleven point plan characterized by the appellants as a "free choice plan." Other plans were submitted to the District Court by the three-member minority of the Dayton Board and Dayton Classroom Teachers' Association. Without holding a hearing on the remedy issue, the District Court approved the plan of the Dayton Board majority with one modification.

The appellants' primary contention on appeal is that the desegregation plan approved by the District Court is inadequate to remedy the cumulative violation found by the District Court. We agree.

On receipt of the Board majority plan, the District Court was obliged "to assess the effectiveness of . . . [the] proposed plan in achieving desegregation . . . . in light of the circumstances present and the options available in each instance." *Green* v. *County School Board*, 391 U.S. 430, 439 (1968). The appellants assert that the circumstances present here, namely a cumulative violation, required a remedy of "all-out desegregation." *Keyes, supra*, 413 U.S. at 214. The appellants further assert that the plan of the Board minority would accomplish such "all-out desegregation" and that therefore we should remand this case to the District Court with instructions that it order the plan of the Board minority implemented.

Today we simply hold that the remedy ordered by the District Court is inadequate, considering the scope of the cumulative violations. The case is remanded to the District Court for proceedings to formulate a desegregation plan for the Dayton school system consistent with the remedial guidelines outlined in *Keyes, supra,* and *Swann, supra.* This holding does not necessarily require the District Court to implement the plan of the Board minority, but "all vestiges of state-imposed segregation," *Swann, supra,* 402 U.S. at 15, must be eliminated.

In formulating a desgregation plan, the District Court of course will adhere also to the guidelines enunciated by the Supreme Court in *Milliken* v. *Bradley,* —— U.S. —— (No. 73-434, July 26, 1974), reversing *Bradley* v. *Milliken,* 484 F. 2d 215 (6th Cir. *in banc* 1973).

Once the plaintiffs-appellants have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" *Keyes, supra,* 413 U.S. at 200. When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school segregation are inadequate. *Id.* at 210-13.

VI. Other Directions on Remand

In its Supplemental Order on Remedy, dated July 13, 1973, the District Court suggested that its disposition of the case appeared "to require the dismissal of those non-Dayton defendants." We disagree with this suggestion as to the State defendants.

The District Court is directed to keep the State defendants as parties to this action. Although, according to the District Court order of procedure, evidence as to a state violation was supposed to be excluded from the initial trial, the following evidence was adduced: The Dayton school district is chartered by the Ohio State Department of Education, and without such a charter, the district would be without power to operate and could not receive state aid. Ohio Revised Code, §§ 3301.16 and 3317.01. Since an Ohio Attorney General's opinion dated July 9, 1956, the State Department of Education has known that it has an affirmative duty under both Ohio and federal law to take all actions necessary, including, but not limited to, the withholding of state and federal funds, to prevent and eliminate racial segregation in the public schools. Finally, during the years in question in this case, the Dayton school district was denied any allocation of state funds for pupil transportation, although such funds were made available to most suburban and rural school districts in the state.

VII. Other Issues

Several other issues were presented which do not now require discussion. All contentions of the parties contrary to the conclusions reached in this opinion have been carefully considered and are found to be without merit.

VIII. Conclusion

The District Court's holding of a cumulative violation of the appellants' constitutional rights, as contained in its Findings of Fact and Memorandum Opinion of Law dated February 7, 1973, is affirmed.

Since we conclude that the remedy prescribed by the District Court is inadequate, the case is remanded to the District Court with directions to revise and supplement its order of July 13, 1973, entitled "Supplemental Order on Remedy," so as to formulate, in accordance with the guidelines hereinabove set forth, a desegregation plan for the Dayton school system and for other proceedings to that end not inconsistent with this opinion.

D. DISTRICT COURT'S JANUARY 7, 1975 ORDER RELATING TO SUBMISSION OF PLAN.

(Filed January 7, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

ORDER

This matter comes before the Court pursuant to remand by the United States Court of Appeals for the Sixth Circuit and following informal conferences called by the Court limited to one attorney for the plaintiffs and one attorney for the defendants. The Court would be remiss if it did not recognize the contributions of plaintiffs' attorney, Louis Lucas, and defendants' attorney, David Greer, whose research, counsel and suggestions materially assisted the Court in the preliminary phase of this matter.

Based upon such conferences, the controlling decisions in this Circuit, and the state of the law on the subject as announced by the Supreme Court of the United States, the Court concludes that it is now appropriate to deal with

specific plans. The parties, including the plaintiffs, the defendant Board of Education of Dayton, and the Board of Education for the State of Ohio will confer and prepare plans either jointly or separately for submission to this Court which will accomplish the following ends and satisfy the requirements set forth in the opinion of the United States Court of Appeals for the Sixth Circuit, 503 F.2d 684 (1974).

In the twenty years that have elapsed since *Brown* v. *Board of Education*, 347 U.S. 483 (1954), large numbers of American cities have faced the problem that now confronts Dayton and have adopted varying methods to solve it. Able, conscientious, and knowledgeable experts in this field have developed. Departments of government, both state and national, are anxious to assist. The experience of other cities and the available experts should be consulted by the parties in the ultimate solution of this problem. Such devices as "pairing" of schools, "clustering" of schools, alterations of attendance boundaries, "magnet" schools, feeder patterns, increasing school capacity, new construction and voluntary transfers, should all be considered. No known desegregation device should be overlooked. The proposals of the Board of Education, both those presented in response to this Court's Order of February, 1973, and those suggested in the informal discussions above referred to should not be abandoned. The thought and planning that preceded these proposals should not be ignored. These proposals have not been considered unresponsive; they have been considered insufficient. They do represent a base for further expansion.

The Court draws particular attention to the proposal of the Dayton School Board to construct magnet schools in the downtown area. It may well be that further development of this concept might achieve the desired goals as to high schools on a voluntary basis.

The Dayton freedom of enrollment program should not be abandoned. It, too, may contribute in great measure to a solution of the problem.

Deliberately absent from the foregoing suggestions is that of transporting students to accomplish racial balance. It does

not require much wisdom or foresight to recognize that this coercive solution is the least satisfactory. The Court will consider transportation of students only as a last resort and only after careful inquiry has established that no other solution exists.

One word of admonition: This is not a problem that will disappear by itself. It is concerned with basic constitutional rights that every public official, including this Court, is sworn to uphold.

In February of 1973, this Court observed that no peaceful community could long exist where two separate societies viewed each other from ever higher walls of suspicion and distrust. The tragic events of the past three months in the city of Boston, Massachusetts, have confirmed this observation with distressing consequences.

With full respect for the Board's knowledge and ability; with full recognition of its representative responsibilities; and with full faith in its dedication and good will, the Court now requests the Board of Education to report upon the months of study and planning that have been completed as they relate to a solution of the problem herein.

The Board of Education will submit its plan to the Court on or before February 1, 1975. A completed plan will be made available for public inspection on or before January 20, 1975. Should it appear necessary, hearings on such plan and any other submitted by interested parties will be held on or before February 15, 1975.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

E. DISTRICT COURT'S MARCH 10, 1975 ORDER ADOPTING PLAN OF DAYTON BOARD OF EDUCATION.

(Filed March 10, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

ORDER

This matter is before the Court pursuant to remand by the United States Court of Appeals for the Sixth Circuit. In accordance therewith this Court on January 7, 1975, directed the School Board of the City of Dayton to submit a plan of desegregation by February 1, 1975 consistent with such Order of Remand. Subsequently, plaintiffs also filed a plan and a hearing on both was held February 17, 19, and 20, 1975.

I. Basis of Court's Consideration

In order to place this Court's consideration of any remedial plan in a proper context certain introductory observations should be made:

1. All desegregation efforts must be tested initially against the principle that separate facilities limited to blacks and whites are forbidden;[1]

2. Racial balance, i.e., a reflection of the district percentages in each school is not a Constitutional right equivalent to the principle above enunciated;[2]

3. It is not the function of district courts to operate public school systems, to determine social values, or to engage in restructuring of communities, personal attitudes, or sociological benefits, except as these matters may bear upon Constitutional rights.[3]

To the foregoing the court would add the following which

[1] "In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"; Brown v. Board of Education, 347 U.S. 483 (1954) (Brown 1).

[2] *Swann v. Board of Education*, 402 U.S. at page 24:

"If we were to read the holding of the District Judge to require as a matter of substantive Constitutional rights any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

See also: Milliken v. Bradley, —— U.S. —— (1974), 94 S.Ct. 3112 at p. 3125.

"The failure of an educational agency to attain a balance on the basis of race, color, or sex or national origin of students among its schools shall not constitute a denial of equal educational opportunity or equal protection of laws." 20 U.S.C. § 1704.

[3] "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a Constitutional violation, however, that would not be within the authority of a federal court." Swann v. Board of Education, supra.

may be deemed findings of fact whether implicit in or explicated by previous opinions of this Court.

1. The State of Ohio does not now, nor has it since 1887 mandated a dual system of public education. To the contrary, 84 Ohio Law 34, dated February 22, 1887, specifically required a unitary public school system.

2. The defendant School Board of the City of Dayton had engaged in activities which were segregative in effect and which did impinge upon the Constitutional rights of students in such system. At no time, however, did defendant maintain a dual system of education.

3. Overt evidences of such segregative activities have been eliminated both by action of the Board of Education and by previous Order of this Court but the effect thereof may not.

II. Duty of District Courts

With the determination that acts of segregation did occur it is now necessary to examine the duty imposed upon this Court under such circumstances. While there is a variation in the description of such duty, this Court elects to be guided in this matter by the following: "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education*, (Brown II), 349 U.S. 294.

There is, however, a final admonition in *Swann* that bears careful attention: "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Board of Education, supra* at p. 16.[4]

[4] A subsequent determination by the Supreme Court of the United States in *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) holds there is broad discretionary power granted to trial courts in shaping equity decrees. Lemon, it should be pointed out, is not a school desegregation case.

Two events that bear upon the scope of appropriate remedy have occurred since August 20, 1974, the date of the appellate holding in this case. These events may well have changed both "the nature of the violation" and the "scope of the remedy." They require further discussion.

First: Effective October 20, 1974, the Congress of the United States adopted the Equal Educational Opportunities Act, 20 U.S.C. § 1701 *et seq.*[5]

Section 1701 declares it to be the policy of the United States that:

"1. All children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

2. The neighborhood is the appropriate basis for determining public school assignment."

Section 1712 imposes a limitation upon courts in the following language: "In formulating a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct *particular denials of equal educational opportunity or equal protection of the laws.* [Emphasis added]

In § 1713 is listed a priority of remedies and in § 1714 there is a specific limitation which holds: "No court . . . shall pursuant to § 1713 of this Title order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such students."

Second: On December 6, 1974, the United States Court of Appeals for the Sixth Circuit decided *George and Carolyn Higgins* v. *Board of Education of the City of Grand Rapids,* (No. 73-2189), — F.2d — (1974). The Court in *Higgins*

[5] The effective date of the above act is said to be, "On and after the sixtieth day after August 21, 1974."

followed *Deal* v. *City of Cincinnati Board of Education,* 369 F.2d 55, *cert. denied* 389 U.S. 847, in these words: "*Deal* [upheld] the constitutionality of retaining neighborhood schools where racial imbalance has not been caused by any discrimination on the part of school officials."[6]

If the nature of the violation determines the scope of the remedy, it becomes critical to determine whether or not there is an unremedied district-wide segregative act. This Court found in its Order of July 13, that specific segregative acts, since eliminated; the existence of optional attendance zones, now eliminated; and conditions of racially imbalanced schools together required action by the federal courts.

We do not deal with a mandated dual school system; we do not deal with actions taken on a school-by-school basis.[7] We do deal with a system that has in the past permitted segregative practices to exist. The issue, therefore, is whether a plan intended to improve the educational opportunities for all students without a school-by-school restructuring basis is appropriate. This Court holds at this time that it is.

III. Plaintiffs' Plan

The plaintiffs have urged upon this Court a plan which will assign students among the Dayton schools in a black/white

[6] *Higgins* mentions *Brinkman* v. *Gilligan* on page 19. This Court respectfully suggests that the following sentence contained therein: "These three findings were held in their cumulative effect to be enough to reflect *de jure* segregation.", requires for full significance an examination of the specific holding of the court. See footnote 7 *infra.*

[7] The only district-wide action of the defendants involved the rescission of resolutions in January of 1970. The United States Court of Appeals dealt with the issue as follows:

"We hold that the findings of fact upon which the District Court based its conclusion of accumulative violations are not clearly erroneous but to the contrary are amply supported by the evidence. Fed. R. Civ. P. 52A. However, we do not pass upon the question at the present time as to whether the rescission of the Board resolutions in and of itself constituted an independent violation of the Constitution. *Brinkman* v. *Gilligan,* 503 F.2d 684 at 693.

ratio approximating the district-wide ratio for such schools with a variation of 15%, plus or minus, from the mean.[8] To accomplish this, the plaintiffs would create "clusters" of elementary schools, additional middle schools, and redistricted high schools. The term "cluster" is taken to mean a group of schools, usually more than two, within a common attendance district to which students will be sent irrespective of proximity to their place of residence.[9] Plaintiffs' plan is a comprehensive one; it was carefully prepared and well-presented. It will do what the plaintiffs urge must be done. It is not intended to, nor will it, in and of itself, provide alternate educational programs or seek innovative learning experiences. In the plaintiffs' view, these are obligations of any school board irrespective of the integration or segregation of the schools. Since this question is not before the Court, it will not be ruled upon.

In the Order of Remand by the United States Court of Appeals for the Sixth Circuit, the following appears:

"In formulating a desegregation plan, the District Court, of course, will adhere also to the guidelines enunciated by the Supreme Court in *Milliken* v. *Bradley*, —— U.S. ——, 94 S.Ct. 3112 (1974)."

The majority opinion by Chief Justice Burger includes the following: "Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the primary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable. Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated – in

[8] According to the testimony the appropriate percentages of Black students for the year 1974-1975 are:

Elementary Schools	44.2%
Middle Schools	68.7%
High Schools	45.5%

[9] Portions of the record dealing with this transportation are included herein as Appendix A.

their view of what constituted desegregation – unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole. . . . In *Swann* which arose in the context of a single independent school district the Court held, 'If we were to read the holding of the District Court to require as a matter of substantive Constitutional rights any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse; 402 U.S. at 24.

The clear import of this language from *Swann* is that desegregation in the sense of dismanteling a dal school system does not require any particular racial balance in 'each school, grade or classroom.'" 94 S.Ct. at 3125.

It would seem, therefore, that whether the area in question is a single school district as in *Swann* or in multi-school districts as in *Milliken,* the obligation does not exist to create racial balance which is in essence the sole function of the plaintiffs' plan.

Accordingly, this Court holds that a comprehensive plan, such as plaintiffs suggest, is not required at this time. We hold also that plaintiffs' plan as presented is violative of the Equal Educational Opportunities Act, 20 U.S.C. § 1701, *et seq.*, and particularly §§ 1713 and 1714.

IV. The Defendant's Plan

The defendant's plan was presented to the Court in a 17 page memorandum with a 26 page exhibit of tables and statistics and a 69 page appendix. It also contains much extraneous material. Only the "magnet" program and the "learning centers" concept require comment.

A magnet high school[10] with programs not offered at home high schools and "satellite" magnet programs intended to attract students from their high schools and districts of resi-

[10] The term "magnet high school" is deemed to mean a school open to all students with programs sufficiently attractive that students will elect to attend. The Stivers-Patterson vocational complex is one example of a magnet school.

dence is proposed. If successful, the magnet program will provide an opportunity to students, both black and white, to obtain additional educational advantages equally attractive to both. Magnet schools are an acceptable desegregation device. 20 U.S.C. § 1713(f).

The magnet's schools are supplemented by "learning centers" for foreign languages and business education for 6th, 7th, and 8th grades; career motivation for 4th and 5th grades; science for 5th, 6th, 7th and 8th grades; and a science environmental center for the 6th grade.

Learning centers to which students are transported are integrative in concept. Plaintiffs assert that such transportation is also violative of 20 U.S.C. §§ 1713 and 1714 since it would require bussing of students to schools other than the school closest or next closest to his or her place of residence. We leave this argument for another day and another court. We hold only that the plan comports with the Congressional declaration of policy set forth in 20 U.S.C. § 1701.

The overall plan is desegrative in intent; it is not violative of *Brown* v. *Board of Education, supra,* and it does not appear to violate the mandate of the United States Court of Appeals for the Sixth Circuit so long as the following limitations are observed:

1. All programs including the magnet schools and the learning centers must be so located that the burden of transportation is substantially equal upon both black and white students;

2. The composition of all classes must be no less than the mean for the appropriate schools plus or minus 15%;[11]

3. The faculty assigned to all programs must reflect the racial percentages of faculty within the system as a whole;

[11] See Footnote 9.

4. The amount of time of student assignment to classes in learning centers shall not be less than 20% of such student's total instructional time.

It is entirely possible that the proposed program will not attract an appropriate number of black and white students and might instead further segregate the Dayton school system. Because it is innovative, because it offers the opportunity for alternative quality education, and because it has been proposed by a board of popularly elected officials, the Plan should be given a fair trial. The Board's plan will be accepted provisionally for the school year 1975 — 1976. The provisional acceptance requires this Court once more to continue jurisdiction of this matter.

There is an omission in the comprehensive plan submitted by the defendants. It is not possible to determine whether the numerous desegregative techniques set forth in this Court's Order of January 7, 1975, have been fully investigated. It is not known, for example, whether adjustments of existing school attendance zones would reduce concentrations of black and white attendance. It is not known whether feasible pairing or clustering of schools could be accomplished without bussing violative of the Equal Educational Opportunities Act.

Accordingly, the defendants are directed to conduct such a study and to report to this Court on or before October 1, 1975, of the results thereof on a school-by-school basis. Further hearings will thereupon be held and an alternative plan consistent with the Equal Educational Opportunities Act will be established on or before January 1, 1976.

In the event defendants are unable by the methods approved in July of 1973 and those approved by this Order to accomplish what this Court deems to be adequate progress in complying with the Equal Educational Opportunities Act and the mandate of the United States Court of Appeals for the Sixth Circuit, such alternative plan will become effective for the school year beginning in September, 1976, and for all school years thereafter.

V. The Dayton School Board

The willingness of this Court to accept defendant's plan at this time is dictated in part by the attitude of the School Board in the City of Dayton. This Court has not been faced with the problems of Judge James B. McMillan who dealt with a recalcitrant school board in *Swann* v. *Charlotte Mecklenburg Board of Education, supra,* nor with those of Judge W. Arthur Garrity, Jr., who has dealt with a contumacious school board in Boston. Any reasonable plan submitted by a board which has demonstrated good faith is entitled in the first instance to careful consideration by a court and in cases of doubt to have such doubt resolved in its favor. Good faith is a two-way street.

VI. Progress of the Case

The pace at which desegregation cases proceed through the courts has been a source of concern by courts and a source of frustration for litigants.[12] It has frequently been observed that over 21 years has elapsed since *Brown* v. *Board of Education, supra,* and the problem appears far from solved. It can even be asserted that the magnitude of the problem has in fact increased in that time. To postpone yet again the ultimate determination of this matter may appear to the plaintiffs to be a further delay of their rights. A chronology of the significant

[12] The complexities of school desegregation have resulted in the following instances of prolonged litigation:

a. *Goss* v. *Board of Education of the City of Knoxville, Tennessee,* original District Court opinion, 186 F.Supp. 559 (1960), recent opinion of United States Court of Appeals for the Sixth Circuit, 444 F.2d 632 (1971):

b. *Kelly* v. *Board of Education of the City of Nashville* (subsequently Metropolitan County Board of Education of Nashville), original District Court opinion, 139 F.Supp. 578 (1956), recent opinion of the United States Court of Appeals for the Sixth Circuit, 463 F.2d 732 (1972).

c. "These appeals represent another installment of an already lengthy serial: 'The desegregation of the Memphis Public School System'. The initial chapter of this story was written in 1960 . . ." *Northcross* v. *Board of Education of Memphis City Schools,* 466 F.2d 890 (1972).

dates in this proceeding might held to place the matter in its proper context.

This case was filed in May of 1972. It was heard on the merits in November of 1972.

A Findings of Fact and Memorandum Opinion of Law was filed in February of 1973. An Order imposing integrative remedies upon defendants was filed in July of 1973. During the school year 1973 — 1974 and 1974 — 1975 these remedies were in effect.

The Order of Remand by the United States Court of Appeals for the Sixth Circuit became effective in October of 1974. The Order herein will at the minimum be effective for the school year 1975 — 1976.

While this is hardly a model of speed and dispatch, it is consistent with the magnitude of the problem that must be solved.

In the mass of rhetoric, emotional outbursts, and demogoguery that have attended the progression of many school desegregation cases, a few voices have been heard to suggest a rule of moderation. One such by Senior Judge Clifford O'Sullivan of the United States Court of Appeals for the Sixth Circuit bears repetition:

> "The hope or dream that one day we will have become a people without any motivation borne of our differing racial beginnings will have a better chance of fulfillment if patience accompanies our endeavors. Strident and truculent judicial commands could indeed exacerbate what now remains of racial bias and prejudice."
> *Goss* v. *Board of Education of the City of Knoxville, Tennessee,* 444 F.2d 632 at 640.

VII. Conclusion

In view of the foregoing, the Court holds as follows:

1. The plan of the defendants as modified herein will have an integrative effect upon the Dayton school system and is provisionally adopted for the school year 1975 — 1976.

2. The plan of the plaintiffs is violative of The Equal Educational Opportunities Act, 20 U.S.C. § 1701, et seq., and imposes a burden upon the defendant school board beyond that which it is presently required to bear.

3. The state of the law in desegregation cases, the Order of Remand in this case, and the Congressional intent in the Equal Educational Opportunities Act, supra, do not require the adoption of a mathematical ratio plan wherein each school, grade or classroom of the district shall contain any particular balance of black and white students representative of the district as a whole.

4. Where the previous actions of a school board indicate only a difference of opinion on a subject concerning which reasonable minds may reasonably differ, bad faith will not be presumed and a proposal, although novel and untried, will be given an opportunity for success.

5. In view of the developments, subsequent to August 20, 1974, the Court is of the opinion that holdings herein regarding the Equal Educational Opportunities Act involve a controlling question of law as to which there is substantial grounds for difference of opinion and an immediate appeal from this Order may materially advance the ultimate termination of the litigation. Accordingly, the Court does so certify in accordance with 28 U.S.C. § 1292(4)(b). An application for appeal in accordance with this determination shall not stay the proceedings in this Court.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX A TO MARCH 10, 1975 ORDER

. . . after this matter was raised during the Louisville argument in the Sixth Circuit, and the Court's inquiry was whether or not the Act of Congress could overcome the constitutional provisions which were being enforced by the courts, and I think I had related that to the witness. I am not sure, but I was present when the Sixth Circuit asked that question, and that conformed with my earlier reading of the Broomfield Amendments which had a similar purpose but, however, had the same saving clause about the power of the courts is not impaired where necessary to remedy a constitution violation.

THE COURT: Well, we are not going to debate the constitutionality of an Act of Congress. I am concerned with the presentation of a plan where it is somewhat peripheral as to the consideration of this Act.

Mr. Greer, you may continue.

CONTINUATION OF CROSS EXAMINATION

BY MR. GREER:

Q. Yesterday, Doctor Foster, we discussed the schools that were left unaffected by your pairing and clustering at the elementary level, and the two examples of the contiguous pairing in your plan. Let's move on to the other nine clusters that comprise your elementary school plan. Each of those nine clusters involve a substantial amount of required bussing of school children to schools beyond those that are closest or next closest to their place of residence; isn't that correct?

A. I believe that is correct, yes.

Q. Let's look, for example, at cluster F of your group. A child in the Lewton school district which is in the eastern part of Dayton is required to spend grades 4 and 5 in Edison school which is on the west side of Dayton; is that not right?

A. That's right.

Q. And am I not also correct that the following schools are closer to the Lewton district: Eastmont, Grant which you are converting to a middle school —

A. Would you hold that just a minute so I can make a note of those?

Q. Sure.

A. All right. Between Lewton and Edison you are speaking of?

Q. That's correct.

A. And what are the schools again?

Q. Well, let me just list them off It would be Eastmont, Kemp, Washington which in your original plan you were going to close, Franklin, Cleveland, Belmont, Horace Mann and then another school that you are planning to turn into a middle school which is Ruskin, Huffman, Webster, Emerson, Patterson, McGuffey, Hawthorne which is your original plan was going to be closed, Irving and Whittier.

A. Well, if you are talking about a direct line between the two schools, you couldn't possibly get all those schools in between the two you are speaking of.

Q. My question wasn't phrased in terms of the way the crow flies. It is whatever schools are closer to the residence of a child living in the Lewton district, and all of those schools would be closer to that child's residence; isn't that true?

A. You mean as the crow flies?

Q. Let's get a lame crow and say going in any direction. Let's make an arc just so we know the distance of what is closer to a child living in the Lewton district.

A. It would say it generally might be true, but to say it was true, I would want to go to the map.

THE COURT: Why don't you do that, Doctor.

THE WITNESS: How many schools did you name altogether?

BY MR. GREER:

Q. Eighteen different schools.

A. All right.

Q. And the same type of situation, of course, would be true in that cluster with respect to students living in the Edison district who would be going over to the east end of Dayton in grades 1 through 3; isn't that true?

A. Yes.

Q. If we turn to cluster C, a child in the first or second grade at Eastmont would be required to be bussed beyond some seventeen or eighteen closer schools in order to attend classes at Highview; isn't that correct?

A. Yes.

Q. And vice versa the same kind of situation would be true for a child living in the Highview district during grades 3 to 5?

A. Yes.

Q. If we look on cluster I, the required bussing between Cardendale and Shiloh passes by ten school zones which are closer to the residences of the children in those two affected school districts; isn't that right?

A. Without counting them, I would believe that is probably accurate, yes.

Q. And without going through the tedium of each of these clusters, isn't it true that the same kind of cross-town required bussing affects students in 24 out of the 28 school zones that are paired or grouped in clusters under your proposal?

A. Again without counting, I would believe that would probably be accurate, yes.

Q. And you have before you the statistics, of course, as to the number of children enrolled in these various schools, don't you?

A. Yes.

Q. Am I not correct in each year something in the area of 9,000 students under your plan would be bussed beyond the second closest school to their place of residence?

A. Pardon me just a second.

Well. I don't get quite that many. At a quick count, I get something like 7,000.

Q. Does that comprise all of the students in these 24 out of 28 school Zones?

A. It would comprise the students in the clusters that you referred to, and our count should be the same because my counts were the same as your staff person that testified about students being bussed in the clusters.

Q. Right. What you just computed for me has been the nine out of the eleven clusters that we started talking about today?

A. That's correct.

F. COURT OF APPEALS' JUNE 24, 1975 OPINION.

(Filed June 24, 1975)

No. 75-1410

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK BRINKMAN, ET AL., *Plaintiffs-Appellants*, v. JOHN J. GILLIGAN, ET AL., *Defendants-Appellees*.	APPEAL from the United States District Court for the Southern District of Ohio.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PHILLIPS, Chief Judge. For a second time this court is called upon to review the constitutionality of a plan ordered by the District Court for the school system of Dayton, Ohio, to remedy cumulative constitutional violations found to exist in that school system. Reference is made to the previous decision of this court, reported at 503 F.2d 684 (6th Cir. 1974), for a detailed recitation of facts and issues.

By a statute enacted February 22, 1887, the State of Ohio abolished separate schools for white and Negro children. Nevertheless, the District Court found that the Dayton school system has failed in many particulars to meet the standards of Ohio law mandating an integrated school system and to comply with the equal protection clause of the fourteenth amendment. Segregative acts and practices were found to have occurred both before and after the decision of the Supreme

Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and to have continued down to the present time. These findings of fact as to segregative practices in Dayton are set forth in detail in our former opinion and will not be repeated here. Suffice it to say that in our former opinion this court ruled that the findings of fact of the District Court as to unconstitutional practices on the part of Dayton School officials are not clearly erroneous, but to the contrary are supported by substantial evidence.

Although the phrase "de jure" does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation practices. *See Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

We agreed with the District Court as to his findings of fact in our former opinion, but held the remedy ordered by that court to be inadequate, considering the scope of the constitutional violations. We remanded the case to the District Court with directions to formulate a desegregation plan for the Dayton school system consistent with the remedial guidelines outlined in *Keyes, supra*, and in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

In our former opinion we said:

> Once the plaintiffs-appellants have shown that state-imposed segregtation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" *Keyes, supra*, 413 U.S. at 200, 93 S.Ct. at 2693. When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school segregation are inadequate. *Id.* at 210-213, 93 S.Ct. 2686. 503 F.2d at 704.

On remand the District Court required the plaintiffs and the Board of Education to submit plans. The plaintiffs' plan

was rejected. The Board's plan was adopted for the school year 1975-76 with minor modifications.

The present appeal is from the decision of the District Court implementing the Board's plan. The question on appeal is whether the Board's plan conforms to the mandate of this court in our decision reported at 503 F.2d 684. We hold that it does not.

The plan approved by the District Court contains some provisions which apparently might effect some improvements in the segregated conditions found to exist in this school system. Some of its key features are as follows:

1. The closing of Roosevelt High School, with its 100 per cent black enrollment. The students previously enrolled at Roosevelt High would be permitted to attend any high school of their choice.

2. Creation of a downtown magnet high school at the Central YMCA, with programs not offered at home high schools, to serve a maximum of 300 students at any one time, and satellite magnet programs intended to attract students from their high schools and districts of residence, which could serve not more than 375 students at any one time. The District Court said: "If successful, the magnet program will provide an opportunity to students, both black and white, to obtain additional educational advantages equally attractive to both." The students would remain in their assigned schools for all other instruction.

3. Creation of three magnet learning centers at which elementary students could participate in foreign language, career motivation, and business education programs. The three centers together would serve about 880 students, who would remain in their assigned schools for other instruction.

4. Expansion of science centers to accommodate additional elementary students. The centers would have a racially balanced enrollment, and attendance would be mandatory, but only ten percent of the student's total instruction time would be spent at the centers.

5. A new vocational school for high school students, known as Kiser Career Center, would be established. This school would have a balanced racial composition, serving 210 students on a free-choice basis.

6. Restructuring of Miami Chapel elementary school into an alternative elementary school with enrollment optional and on a full-time basis. Miami Chapel has a capacity of over 700 students, but the Board anticipates that the school as restructured will serve approximately 500 students. Miami Chapel presently is an all-black school serving 380 students, and there is some indication in the record that these students, if not admitted to the restructured school, will be assigned to the all-black Louise Troy or Wogaman schools.

7. Creation of a magnet alternative school for 150 intermediate grade level students in an attempt to keep potential drop-outs in school, without regard to race.

8. The freedom of enrollment and open enrollment programs put into effect earlier by the Board would be continued.

In approving this plan, the District Court added the following provisions:

1. All programs including the magnet schools and the learning centers must be so located that the burden of transportation is substantially equal upon both black and white students;
2. The composition of all classes must be no less than the mean for the appropriate schools plus or minus 15%;
3. The faculty assigned to all programs must reffect the racial percentages of faculty within the system as a whole;
4. The amount of time of students assignment to classes in learning centers shall not be less than 20% of such student's total instructional time.

This is essentially all the relief afforded by the District Court

for the 1975-76 school year. The court expressed uncertainty as to whether the plan would be completely effective and ordered the Board to develop and file a more comprehensive plan by January 1, 1976. The court stated that if the 1975-76 plan should prove to be ineffective, an alternate plan would be instituted for the school year beginning in September 1976.

The District Court described the approved plan as "desegregative in intent" and concluded that it would have "an integrative effect." It appears that the plan contains some significant curricular innovations and that it would be a step toward integration of the Dayton school system. We believe, however, that more is required by the Constitution, by recent decisions of the Supreme Court, including those herein cited, and by the previous mandate of this court. As the appellants point out, under the plan approved by the District Court the basic pattern of one-race schools will continue largely unabated. The plan does not even purport to dismantle Dayton's one-race schools other than Miami Chapel and Roosevelt High School, and even if the magnet plans are successful, the vast majority of one-race schools will remain identifiable as such. The District Court's plan fails to eliminate the continuing effects of past segregation and is, therefore, inadequate.

In the course of his opinion, the District Judge noted two events which have occurred since our first opinion in this case, both of which he thought supported the narrow remedy he ordered on remand.

The District Court said:

> First: Effective October 20, 1974, the Congress of the United States adopted the Equal Educational Opportunities Act, 20 U.S.C. § 1701 *et seq.*
>
> Section 1701 declares it to be the policy of the United States that:
>
> "1. All children enrolled in public schools are entitled

to equal educational opportunity without regard to race, color, sex, or national origin; and

2. The neighborhood is the appropriate basis for determining public school assignment."

Section 1712 imposes a limitation upon courts in the following language: "In formulating a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct *particular denials of equal educational opportunity or equal protection of the laws.* [Emphasis added]

In § 1713 is listed a priority of remedies and in § 1714 there is a specific limitation which holds: "No court . . . shall pursuant to § 1713 of this Title order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such students."

Second: On December 6, 1974, the United States Court of Appeals for the Sixth Circuit decided *George and Carolyn Higgins* v. *Board of Education of the City of Grand Rapids,* (No. 73-2189), 508 F.2d 779 (1974). The Court in *Higgins* followed *Deal* v. *City of Cincinnati Board of Education,* 369 F.2d 55, *cert. denied* 389 U.S. 847, in these words: "*Deal* [upheld] the constitutionality of retaining neighborhood schools where racial imbalance has not been caused by any discrimination on the part of school officials."[6]

[6] *Higgins* mentions *Brinkman* v. *Gilligan* on page 19. This Court respectfully suggests that the following sentence contained therein: "These three findings were held in their cumulative effect to be enough to reflect *de jure* segregation.", requires for full significance an examination of the specific holding of the court.

The Equal Educational Opportunity Act of 1974 by its terms does not prevent the District Court from carrying into effect

the previous mandate of this court. 20 U.S.C. § 1702(b) expressly provides:

> (b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, *except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.* (Emphasis supplied.)

We construe the 1974 Act, read as a whole, as not limiting either the nature or the scope of the remedy for constitutional violations in the instant case.

There could be no possible merit in the contention that the opinion of this court in *Higgins,* relating to the school system of Grand Rapids, Michigan, altered in any way the nature of the cumulative violations described in our former opinion in the present case or the scope of the constitutional remedy required by this court on the remand which we directed in that opinion. The law in the present case is embodied in the opinion of this court reported at 503 F.2d 684. Our previous opinion is not changed in any way by *Higgins,* which dealt with a different school system and a distinguishable factual situation.

Appellants have petitioned for summary reversal. Except for the time factor, we would be inclined to grant this relief. However, it obviously would be difficult if not impossible, in the limited time now available, for the District Court to formulate a comprehensive plan for the 1975-76 school term and to put it into effect in September 1975 without disruption of the large school system in the Dayton school district.

Instead of summary reversal, we remand this case to the District Court with directions to modify the plan previously approved for the 1975-76 school year so as to improve the racial

balance before September 1, 1975, in as many of the remaining racially identifiable schools in the Dayton system as feasible.

We further direct that black students who attended the Miami Chapel elementary school during the 1974-75 school year, and who are not assigned to the restructured Miami Chapel school, be assigned to other than all-black schools during the 1975-76 school year.

The District Court already has expressed an intention to adopt a revised and improved plan for the school year 1976-77. On remand we direct that the court adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keys* and *Swann*. We direct that this plan be adopted not later than December 31, 1975, so that it may be placed in effect at the beginning of the new school year in September 1976.

This case is remanded to the District Court for further proceedings consistent with this opinion.

The mandate of this court on the present appeal will issue forthwith. The costs of this appeal are taxed against the Dayton Board of Education.

G. COURT OF APPEALS' JUNE 24, 1975 REMAND JUDGMENT.

(Filed June 24, 1975)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1410

MARK BRINKMAN, ET AL.,

Plaintiffs-Appellants,

v.

JOHN J. GILLIGAN, ET AL.,

Defendants-Appellees.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from

the Dayton Board of Education the costs on appeal, as itemized below, and that execution therefore issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
By /s/ GRACE KELLER
Grace Keller
Chief Deputy

Issued as Mandate: June 24, 1975
COSTS: Amount to be determined later
Filing fee ----------$
Printing $
Total $

A True Copy.
Attest:

John P. Hehman, Clerk
By /s/ GRACE KELLER
Chief Deputy

H. DISTRICT COURT'S DECEMBER 29, 1975 ORDER.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-75-304

MARK BRINKMAN, et al.,
Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,
Defendants.

ORDER

This matter is before the Court pursuant to Order of Remand by the United States Court of Appeals for the Sixth Circuit expressed in the following terms:

> We direct that the Court adopt a system-wide plan for the 1976-1977 school year that will conform to the previous mandate of this Court and the decisions of the Supreme Court in *Keyes* and *Swann*.[1]

Pursuant to such remand, defendant Dayton Board of Education and plaintiff NAACP presented plans to the Court. Testimony and evidence in support thereof was presented on December 8-9, 1975. A third plan based upon findings by the late Dr. Charles A. Glatt, Court-appointed expert, was presented by a group known as "Friends of Dr. Glatt" although no evidence or testimony accompanied such plan. The Court notes in passing the significant contribution of Dr. Glatt to this most complex problem.

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[1] *Brinkman* v. *Gilligan*, 518 F.2d 853 at 857.

A determination of this matter and its future progress will be considered under the following headings:

I. Standards of Examination

II. Master

III. Community Participation

IV. Conclusions of Law

I.

STANDARDS OF EXAMINATION

Given the predicate that the limited segregatory activities found by this Court in its Order of February 7, 1973, brings this matter within the ambit of *Swann*[2] and *Keyes*,[3] the remedy must be obvious. This Court now reaches the reluctant conclusion that there exists no feasible method of complying with the mandate of the United States Court of Appeals for the Sixth Circuit without the transportation of a substantial number of students in the Dayton school system. Based upon the plans of both the plaintiff and defendant the assumption must be that the transportation of approximately 15,000 students on a regular and permanent basis will be required. No contrary remedial suggestion has been offered by any person or group. No authority has been found or cited that would justify any other disposition.

An analysis of the two plans submitted discloses more a difference of technique than a difference of result. In essence, the plaintiffs would pair and cluster existing elementary schools in a fashion to insure a racial balance approximating that of the school district as a whole with existing attendance zones of such schools remaining approximately intact. The existing

[2] *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1973).

[3] *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

elementary schools would provide feeder patterns for the appropriate high schools. Under plaintiff's plan almost every student would at some time be transported to and from school.

Defendants' plan is based upon a series of choices to be made by parents which will provide educational alternatives.[4] Defendants have agreed that there is nothing inherent in their plan to prevent racial balancing appropriate to the district as a whole and it is in this context that such plan has been considered.

It would be foolish indeed to ignore the rhetoric that has accompanied twenty years of the school desegregation problem. The catch phrases, "forced busing," "quality education," "racial balance," and "white flight," have served as a form of shorthand mainly to obscure rather than to clarify the nature of the problem involved.

This Court's position and determination can best be understood by a reference to personal judicial philosophy as it bears upon the overall subject of educational racial discrimination.

I believe that it is not the function of the United States District Court to oversee the methods whereby children are instructed. I believe that it is not the function of the United States District Court to advance by judicial fiat any social philosophy, however benign. The temptation to do either or both has proved almost irresistible in the field of school desegregation.

The qualitative nature of education is a matter for local determination. The citizens of a school district are entitled to select, free from federal supervision, those elected representatives who in the citizens' collective opinion will best administer such school system. The citizens are entitled to determine the amount they are willing to pay for the educational

[4] Counsel for the defendants has asserted that defendants have "submitted" a plan rather than "proposed" or "recommended a plan. In view of this Court's holding (page 8), the distinction appears irrelevant.

facilities they desire. It might appear that the foregoing statement is basic enough to be included in an eighth grade Government text. True. But the significance of this lesson apparantly has been lost upon those who ignore its validity. It is only when elected representatives deny equality of treatment that federal courts should intervene.

It can be urged with assurance that in a pluralistic society all children should be exposed at the earliest feasible time to children of other backgrounds. True. I agree that both the children and society itself will benefit. I do not agree, however, that a failure of exposure, in and of itself, amounts to a constitutional deprivation correctable only by the federal courts. In sum, there are aspirations of a peaceful and happy society that do not rise to a constitutional level and are not therefore attainable in a court of law.

Court deal with rights, not ethical behavior, not social accommodations, but rights, rights guaranteed by the Constitution of the United States. That is and should be the limit of our function.

In contrast to the foregoing, it is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.

The only feasible method of sharing requires a balancing in each school between black and white students in a ratio approximating the system-wide balance. Insofar as either plan will result in an acceptable redistribution, such plan meets the constitutional limitations set forth in both the *Swann* and *Keyes* cases.

The defendants may adopt their own plan, may adopt the plaintiff's plan, may combine the two, or any parts thereof, provided that each school in the school district as of September 1, 1976, is desegregated as defined herein.

Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced: None is acceptable if not.

At this time the composition of the Dayton School District is approximately 48% black – 52% white. So long as the schools of the Dayton School District each reflect this district ratio plus or minus 15%, they will be deemed to be desegrated.[5] Accordingly, this Court does therefore ORDER that as of September 1, 1976, each and every school in the Dayton School District will have a pupil population approaching the district percentage, but deviating no more than 15%, plus or minus.

There is a specific and limited exception from the foregoing that the Court will permit. Under the present system in force in Dayton, Ohio, students commence attendance at a specific high school in the tenth grade and remain there until graduation some three years later at the end of the twelfth grade. A high school is more than a collection of classrooms. It is an entity in which the students take deep pride. It is frequently the first and often the last educational entity with which students identify. There would appear to be something unfair in a situation that might destroy the continuity of athletic teams, student publications and activities. The one or two years already spent in a high school has created a loyalty that should be encouraged. There are all too few such institutions still remaining in our society today.

Limited only to high school students and limited only to the academic years of 1976-1977 and 1977-1978, the Court will permit those students already enrolled in a specific high school to graduate from that high school, even though the ultimate determination of attendance boundaries would exclude them therefrom. This privilege shall not be extended to any student not already enrolled in the tenth or eleventh grades of a specific high school.

The Court notes the following language in *Swann*:

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[5] See Footnote 12, *Higgins* v. *Board of Education of the City of Grand Rapids*, 508 F.2d 779 at 787 (6th Cir. 1974).

> The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.[6]

In a situation, however, where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis.

II.

MASTER

In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary students.

1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
2. Students should be transported to the nearest available school;
3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

The logistics involved will be complex and time-consuming. The establishment of attendance zones for each of the schools will require supervision by this Court. Accordingly, in accordance with Rule 53 of the Federal Rules of Civil Procedure, the Court does find that this case is one wherein exceptional conditions require the appointment of a Master.

Dr. John A. Finger of Providence, Rhode Island, is hereby appointed Master to supervise such undertaking. Such Master will have all of the powers set forth in Rule 53(c),

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[6] *Swann*, *supra* at page 24.

Fed. R. Civ. P., and will at the earliest possible time submit to this Court a report indicating the number of students by race who will attend each of the schools in the Dayton school system in accordance with the direction set down heretofore. An opportunity will be given to the defendant to obtain promptly information regarding parent choices as outlined on pages 81-83 of the defendant's plan. Such Master will receive out-of-pocket expenses and compensation for his services rendered in such amount as the Court may determine. Previous Orders of this Court directing assistance to Dr. Finger will apply equally to his service as Master.

III.

COMMUNITY PARTICIPATION

The parties are in agreement that a citizens board should be appointed to monitor the plan as ultimately adopted and to insure that it functions in accordance with the Order of this Court. Such a board composed of representative citizens of the community will be appointed for a period not to exceed three years. The Court will reserve the right to extend or to terminate the services of such board, should such prove advisable. Defendants are directed to make space available for the needs of such board, to provide necessary secretarial and clerical assistance, and to make available at all reasonable times such information as the board may from time to time require. The members of this board will serve without compensation, but will be reimbursed for out-of-pocket expenses which will be taxed as court costs in this matter.

IV.

CONCLUSIONS OF LAW

A.

A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated

system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education.*

B.

Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such system.

C.

Educational techniques, experimental schools and expanded parent choice are not matters relating to constitutional deprivations so long as the requirements of Conclusion of Law A are followed.

D.

Defendant, Dayton Board of Education, must provide adequate transportation for all students affected by reassignment to comply with this Order.

It is so ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

I. DISTRICT COURT'S DECEMBER 29, 1975 JUDGMENT.

(Filed December 29, 1975)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-75-304

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,

Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that limited only to high school students and limited only to the academic years of 1976-1977 and 1977-1978, the Court will permit those students already enrolled in a specific high school to graduate from that high school, even though the ultimate determination of attendance boundaries would exclude them therefrom. This privilege shall not be extended to any student not already enrolled in the tenth or eleventh grades of a specific high school. Where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis.

In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary students.

1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;

2. Students should be transported to the nearest available school.

3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

The establishment of attendance zones for each of the schools will require supervision by this Court. Accordingly, in accordance with Rule 53 of the Federal Rules of Civil Procedure, the Court does find that this case is one wherein exceptional conditions require the appointment of a Master.

Dr. John A. Finger of Providence, Rhode Island, is hereby appointed Master to supervise such undertaking. Such Master will have all of the powers set forth in Rule 53 (c), Fed. R. Civ. P., and will at the earliest possible time submit to this Court a report indicating the number of students by race who will attend each of the schools in the Dayton school system in accordance with the direction set down heretofore. An opportunity will be given to the defendant to obtain promptly information regarding parent choices as outlined on pages 81 – 83 of the defendant's plan. Such Master will receive out-of-pocket expenses and compensation for his services rendered in such amount as the Court may determine. Previous Orders of this Court directing assistance to Dr. Finger will apply equally to his service as Master.

The parties are in agreement that a citizens board should be appointed to monitor the plan as ultimately adopted and to insure that it functions in accordance with the Order. A board composed of representative citizens of the community

will be appointed for a period not to exceed three years. The Court will reserve the right to extend to or terminate the services of such board, should such prove advisable. Defendants are directed to make space available for the needs of such board, to provide necessary secretarial and clerical assistance, and to make available at all reasonable times such information as the board may from time to time require. The members of this board will serve without compensation, but will be reimbursed for out-of-pocket expenses which will be taxed as court costs in this matter.

A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education.*

Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such systems.

Educational techniques, experimental schools and expanded parent choice are not matters relating to constitutional deprivations so long as the requirements of Conclusion of Law A are followed.

Defendant, Dayton Board of Education, must provide adequate transportation for all students affected by reassignment to comply with this Order.

Dated at Dayton, Ohio, December 29, 1975

JOHN D. LYTER, CLERK
/s/ Rebecca J. Ellis, Deputy

J. DISTRICT COURT'S MARCH 23, 1976 ORDER.

(Filed March 23, 1976)

No. C-3-75-304

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARK BRINKMAN, et al,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al,

Defendants.

ORDER

This matter is before the Court for consideration of the Master's report heretofore filed. Pursuant to the filing of such report a hearing was held March 22 and 23, 1976, in accordance with Rule 53(e)(2) of the Federal Rules of Civil Procedure. At such hearing the parties were given an opportunity to present evidence and testimony.

Upon consideration of such report and the testimony and evidence presented, the Court is of the opinion that such report should be disposed of as follows:

I.

ELEMENTARY SCHOOLS

That portion of the Master's report dealing with the desegregation of elementary schools in the Dayton School District by the device of pairing is in keeping with the mandate of the United States Court of Appeals for the Sixth Circuit and the order of this Court dated December 29, 1975. Accordingly, such pairing assignment is hereby adopted.

The Master's report recommends a semiannual exchange of paired schools with a similar exchange assignment of teachers.

Defendant Dayton Board of Education has proposed an annual exchange without movement of teachers (Board Exhibit CW).

Subject to the limitations set forth on page 5 of this Court's order of December 29, 1975,[1] defendant may adopt either method.

The proposal of defendant Dayton Board of Education seeks a three-phase implementation over a three year period. In view of the mandate of the United States Court of Appeals for the Sixth Circuit, 518 F.2d 833 at 857, such "phase in" is hereby rejected.

Certain elementary schools will be desegregated by zone change. Such zone changes as are recommended in the Master's report are hereby approved.

II.

HIGH SCHOOLS

The Master's report for desegregating high schools recommends a selection by students plus a random assignment where necessary (Master's report pp. 15-18). Defendant has suggested an assignment program by specific attendance districts (Board Exhibit CV).

Subject to the limitations set forth on page 5 of this Court's order of December 29, 1975, and subject further to the exception for high school juniors and seniors set forth on pages 5 and 6 of such order, defendant may adopt either method of assignment.

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[1] "At this time the composition of the Dayton School District is approximately 48% black — 52% white. So long as the schools of the Dayton School District each reflect this district ratio plus or minus 15%, they will be deemed to be desegregated. Accordingly, this Court does therefore ORDER that as of September 1, 1976, each and every school in the Dayton School District will have a pupil population approaching the district percentage, but deviating no more than 15%, plus or minus."

III.

MISCELLANEOUS

The report of the Master dealing with "Handicapped and Special Education Program," "Magnet Schools," and "Magnet Programs for Grades 6, 7 and 8" are hereby adopted.

Defendant's attention is directed again to the following portion of the order of December 29, 1975:

> "Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced. None is acceptable if not."

IV.

FURTHER PROPOSALS

The order of reference heretofore referred to directed the Master to report upon particular issues. Portions of the Master's report not dealing with those particular issues will be deemed personal recommendations of such Master and not requiring action by this Court.

This order is intended to be a final and appealable order and a determination pursuant to the mandate of the United States Court of Appeals for the Sixth Circuit.

No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

It must be obvious to all parties concerned that the longer an opportunity is given for students, teachers and the community to understand a specific plan, the easier a transition period will be. In any proposal for a change after this date, the Court will take into consideration the amount of "lead time" available prior to September 1, 1976. In the event the Court determines that a proposed change should be adopted

but that insufficient time remains prior to September 1, 1976, such improvement may be adopted effective September 1, 1977, or such other date as might appear appropriate at the time.

V.

SUMMARY

Defendant has raised five objections to the report of the Master:

1. Pupil assignment should be made by the central administration;
2. Pupil assignment should be made in the spring of 1976;
3. Transfer of elementary students should be made on a yearly rather than on a semester basis;
4. The Elementary School Plan should be a three-phase plan and
5. High School assignment should be on the basis of geographic zone rather than upon choice and random assignment.

The Court has disposed of such objections as follows: With the exception of Objection 4 which has been rejected, the defendant Dayton Board of Education may assign students by action of the central administration, may assign students this spring, may transfer elementary school students on an annual basis, and may assign high school students by geographic zones.

All of the foregoing being subject to the limitations of this Court's order of December 29, 1975.

All other questions still remaining before the Court, such as payment of attorney fees and the sharing of costs among the several defendants herein are hereby continued for further disposition.

IT IS SO ORDERED.

CARL B. RUBIN
United States District Judge

K. DISTRICT COURT'S MARCH 25, 1976 JUDGMENT.

(Filed March 25, 1976)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-75-304

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,

Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that upon the consideration of the Master's report and the testimony and evidence presented in accordance with Rule 53(e)(2) of the Federal Rules of Civil Procedure, that such report should be disposed of as follows:

I ELEMENTARY SCHOOLS: That portion of the Master's report dealing with the desegregation of elementary schools in the Dayton School District is hereby adopted. Defendant Dayton Board of Education has proposed an annual exchange without movement of teachers (Board Exhibit CW); the Master's report recommends a semiannual exchange of paired schools with a similar exchange assignment of teachers.

Subject to the limitations set forth on page 5 of this Court's Order of December 29, 1975, defendant may adopt either method. Certain elementary schools will be desegregated by zone change. Such zone changes as are recommended in the Master's report are hereby approved.

II HIGH SCHOOLS: The Master's report for desegregating high schools recommends a selection by students plus a random assignment where necessary (Master's report pp. 15-18). Defendant has suggested an assignment program by specific attendance districts (Board Exhibit CV). Subject to the limitations set forth on page 5 of this Court's Order of December 29, 1975, and subject further to the exception for high school juniors and seniors set forth on page 5 and 6 of such order, defendant may adopt either method of assignment.

III MISCELLANEOUS: The report of the Master dealing with "Handicapped and Special Education Program," "Magnet Schools," and "Magnet Programs for Grades 6, 7, and 8" are hereby adopted. Defendant's attention is directed again to the following portion of the order of December 29, 1975: "Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced. None is acceptable if not."

IV FURTHER PROPOSALS: No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

In any proposal for a change after this date, the Court will take into consideration the amount of "lead time" available prior to September 1, 1976. In the event the Court determines that a proposed change should be adopted but that insufficient time remains prior to September 1, 1976, such

improvement may be adopted effective to September 1, 1976, such improvement may be adopted effective September 1, 1977, or such other date as might appear appropriate at the time.

The following objections were raised by Defendant and are disposed of as follows:

1. Pupil assignment should be made by the central administration;
GRANTED;

2. Pupil assignment should be made in the spring of 1976;
GRANTED;

3. Transfer of elementary students should be made on a yearly rather than on a semester basis;
GRANTED;

4. The Elementary School Plan should be a three-phase plan;
REJECTED;

5. High School assignment should be on the basis of geographic zone rather than upon choice and random assignment;
GRANTED;

THE FOREGOING BEING SUBJECT TO THE LIMITATIONS OF THIS COURT'S ORDER OF DECEMBER 29, 1975.

All other questions still remaining before the Court are hereby continued for further disposition.

APPROVED FOR ENTRY:

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

JOHN D. LYTER, CLERK
/s/ REBECCA J. ELLIS
Rebecca J. Ellis, Deputy

Dated at Dayton, Ohio, this
24th day of March, 1976.

L. DISTRICT COURT'S MAY 14, 1976 ORDER.

(Filed May 14, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-75-304

MARK BRINKMAN, et al.,
Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,
Defendants.

ORDER

This matter is before the Court on the motion of defendant Dayton Board of Education dated May 11, 1976, to modify the Report of the Master. Such motion is in six branches. The first five branches of such motion refer to matters that appear to be within the limits of modification set forth by this Court in its Order of March 23, 1976. Such five branches are hereby GRANTED.

The request in branch no. 6 is not within the permissive changes in the Order of March 23, 1976 and such branch of motion is hereby DENIED.

It is so ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

M. COURT OF APPEALS' JULY 26, 1976 ORDER.

Decided and Filed July 26, 1976

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-1854

MARK BRINKMAN, et al.,

Plaintiffs-Appellees,

v.

JOHN J. GILLIGAN and DAYTON BOARD OF EDUCATION, et al.,

Defendants-Appellants.

APPEAL from the United States District Court for the Southern District of Ohio.

Before: PHILLIPS, Chief Judge; PECK and LIVELY, Circuit Judges.

PER CURIAM. The Dayton, Ohio Board of Education (the Board) appeals from a judgment of the district court entered on March 25, 1976 which implemented its desegregation order and judgment of December 29, 1975. This court has considered two previous appeals in this litigation and our opinions are published at 503 F.2d 684 (1974) and 518 F.2d 853 (1975). This court concluded that the desegregation order

from which the second appeal was taken (by the plaintiffs) was inadequate and we remanded the case to the district court with specific instructions, as follows:

> On remand we direct that the court adopt a systemwide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*. We direct that this plan be adopted not later than December 31, 1975, so that it may be placed in effect at the beginning of the new school year in September 1976. 518 F.2d at 857.

After considering a plan proposed by the plaintiffs and one "submitted" but not "proposed" or "recommended" by the Board, the district court filed an order and a judgment on December 29, 1975. The judgment provided, in part, as follows:

> A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education*.
>
> Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such systems.

The judgment also permitted high school students already enrolled at a particular school to graduate from that school regardless of attendance zone boundaries. The judgment contained guidelines to be followed "wherever possible for elementary students":

> 1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
>
> 2. Students should be transported to the nearest available school.
>
> 3. No student should be transported for a period of

> time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

Dr. John A. Finger, Jr. was appointed Master to establish attendance zones and a citizens board was authorized to monitor "the plan."

On March 15, 1976 the Master filed a report containing recommended desegregation plans for the elementary schools and the high schools of the Dayton system. The report contemplated achieving desegregation of the elementary schools by a combination of redefining attendance areas and the pairing of schools. Under the plan proposed for the high schools attendance zones would be the primary tool. In a judgment entered March 25, 1976 the district court adopted the portion of the Master's report dealing with the elementary schools and approved the Master's recommended zone changes. However, the Board was given the option of making annual exchanges between paired schools without a movement of teachers or semi-annual exchanges of both pupils and teachers as recommended by the Master. The judgment also permitted the Board to implement high school desegregation by employing an assignment program by specific attendance districts rather than following the Master's proposal of permitting school selection by students plus random assignments as necessary to achieve the mandated plus or minus 15% range. The court denied the Board's proposal for a three year phase-in of the elementary school plan.

The March 25 judgment contained this additional provision:

> IV FURTHER PROPOSALS: No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

On appeal the Board argues that the remedy ordered by the district court exceeds the scope of the violations. It is argued that the district court has adopted a fixed percentage formula to achieve racial balance in the Dayton schools contrary to the holding of the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Board relies particularly upon the Court's statement that the constitutional requirement for school desegregation does not mean that "every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24.

This court has previously held that the practices of the Dayton school system constituted de jure segregation, citing *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973). *Brinkman*, *supra*, 518 F.2d at 854. Though this court ordered systemwide desegregation, the Board proposed no plan to achieve this mandate and made no showing of the existence of conditions related to the topography of the Dayton area, location of natural or artificial barriers, geographic isolation or similar considerations which might militate against an order requiring cross-district transportation of pupils. *Compare Goss* v. *Board of Education of Knoxville*, 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

The student composition of the Dayton school system is approximately 48% black and 52% white. Application of the district court's requirement that each school's ratio be within plus or minus 15% of the racial makeup of the system will permit black enrollments at particular schools to range between 33% and 63%. Rather than establishing a fixed mathematical requirement as the Board claims it does, this formula provides a flexible basis of pupil assignment similar to that approved by the Supreme Court in *Swann, supra.* The flexibility of the district court's judgment is further illustrated by the exemption of two entire grades of high school students, the provision for variations from the plus or minus 15% requirement "in exceptional circumstances" and the options

granted the Board which permitted it to choose alternate methods of achieving desegregation rather than being required to follow in every detail the plan submitted by the Master. We view the use of mathematical ratios in this case as no more than "a useful starting point" in shaping a remedy for past discrimination. *Swann, supra,* 402 U.S. at 25.

Our conclusions are in accord with those of other courts of appeals which since *Swann* have approved desegregation plans requiring system-wide adherence, within an established percentage range, to the student racial composition of the district. *See, e.g., Morgan* v. *Kerrigan,* 530 F.2d 401 (1st Cir.), *cert. denied,* 44 U.S.L.W. 3719 (U.S. June 10, 1976); *Harrington* v. *Colquitt County Board of Education,* 460 F.2d 193 (5th Cir.), *cert. denied,* 409 U.S. 915 (1972); *United States* v. *School District of Omaha,* 521 F.2d 530 (8th Cir.), *cert. denied,* 423 U.S. 946 (1975); *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973); *Keyes* v. *School District No. 1, Denver,* 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976).

The Board also argues that the district court based its judgment on a misconception of the constitutional requirements for a unitary school system. In its order of December 29, 1975, which discussed the provisions contained in the separate judgment entered the same day, the district court wrote —

> . . . it is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.

When considered out of context and read literally the quoted language does appear to create a right which the federal courts have never recognized. However, in the context of the order this statement appears to be nothing more than an affirmation that a system-wide desegregation plan must necessarily involve all the facilities of a school system and that pupil assignments will be made as required to eliminate the vestiges of

past discrimination without regard to the comparative quality of the various facilities. Be that as it may, the quoted language does not appear in the judgment, which is the instrument this court reviews on appeal.

At oral argument counsel for the Board contended that there is implicit in the judgment of the district court a requirement for periodic changes in the Dayton plan to maintain the required racial mix and that this violates the rule enunciated by the Supreme Court in *Pasadena City Board of Education* v. *Spangler,* — U.S. —, 44 U.S.L.W. 5114 (U.S. June 28, 1976). The short answer to this argument is that the judgment directs no changes after the 1976-77 school year. The district court did not adopt *in toto* the Master's report in which there was speculation about the necessity for future adjustments in the plan. The *Spangler* decision held that after Pasadena had established a unitary school system the district court could not require annual adjustments in attendance zones to prevent the development of racially identifiable schools within the system, where subsequent changes in the racial mix are caused by factors for which the school authorities could not be considered responsible. The judgment appealed from in the present case established the first constitutionally sufficient desegregation plan for the Dayton system. If adjustments to this plan are sought by any of the parties in future years the district court will necessarily consider the limitations of *Spangler* in dealing with such requests.

The judgment of the district court is affirmed.

III. RELEVANT RULINGS AND MOTION.

A. RULING OF TRIAL COURT MADE AT OPENING OF HEARING ON VIOLATION HELD IN NOVEMBER AND DECEMBER OF 1972.

[R. I. 1-2, Vol. 1] THE COURT: Before we commence, gentlemen, I would like to make a statement for the record and then you may make your responses. This is a limited hearing on this case and it is intended to be a preliminary inquiry. I want you gentlemen to understand if it develops in this inquiry that later hearings are necessary, they will be held. At this time however, we are going to inquire only into the question that was discussed with counsel at the pretrial hearing. We are going to inquire of whether or not acts by the School Board of Dayton have created a segregated school system.

At this time, we are not going to inquire into the questions regarding the so-called State Defendants unless there is a showing that their activities in some fashion contributed to or were acts with the School Board of Dayton.

* * *

B. MOTION OF DAYTON BOARD RELATING TO STANDING.

[R. I. 1717, Vol. 17] We would move further for a directed verdict on the ground that there has been a failure of proof that the Plaintiffs in this action are members of the class which they purportedly represent or that this action is properly maintable as a class action under Rule 23.

* * *

C. RULINGS OF TRIAL COURT MADE AT REMEDIAL HEARINGS IN DECEMBER OF 1975 AND MARCH OF 1976.

[R. III. 52-55] Q. On page 16 you make the statement about declining enrollment is common these days to schools throughout the nation. This is at the top of the page. Then you conclude that the figures just presented suggest, however, and I am not sure what you mean by however an inordinate drop in the white student population, some of which must be attributed to a continued move to the suburbs. That continued to move to the suburbs is not something that results from the desegregation order, is it?

That has been going on in Dayton for the last 20 years?

A. It was established today approximately 11,000 white youngsters and 900 black youngsters have left Dayton in the last five years.

Q. There has been a substantial out white migration in most urban centers; is that correct?

A. Yes.

Q. And that is without regard to desegregation; is that correct?

A. Yes, it has been going on. In some instances with desegregation and in some instances without.

Q. In the 20 major cities of this country, has there been any court orders bussing or pairing or clustering of schools that resulted in white out-migration in the last 20 years?

THE COURT: Mr. Lucas, assume it either way. Assume that a court order has decimated the schools, or assume it has had no effect. Of what significance is that? These are social problems that I don't really feel the Court should enter into. Whatever the effects of desegregation may be or whatever the effects of the court order, this isn't a matter of choice. We have passed the point in this case where these things are relevant.

MR. LUCAS: Your Honor, the only relevance that I possibly see, and I basically agree with the Court, is their reason

for not using pairing and clustering as I understood it was because it produces this type of phenomena, and then they cite some bogus statistics about Professor Coleman, which he since recounted, and other so-called authorities to support that proposition.

To the extent they are relying on it, I think it is significant to demonstrate the truth or falsity of the position.

THE COURT: I don't really think it is worth the time, Mr. Lucas. Would you proceed, please?

BY MR. LUCAS:

Q. In fact, Dr. Gordon, isn't that the reason why your team was told by the Board to reject the alternative of pairing and clustering?

THE COURT: I would suggest, Mr. Lucas, that you proceed to something else. I am simply not interested in this.

MR. LUCAS: Your Honor, I think it is essential that we know why the desegregation has been rejected, whether it is a good reason or bad reason.

THE COURT: Mr. Lucas, it may well be that we see these hearings in different lights. I would ask that you proceed to another matter.

BY MR. LUCAS:

Q. Dr. Gordon, why did you reject pairing and clustering?

THE COURT: Mr. Lucas, I would ask you to proceed to another matter.

MR. LUCAS: Your Honor is instructing me I may not ask —

THE COURT: Mr. Lucas, you have been instructed. Would you proceed to another matter?

MR. LUCAS: I just wanted the record to be clear.

THE COURT: I am sure the record is abundantly clear, and, Mr. Lucas, if I must tell you a third time, I will do so. Proceed to another matter.

MR. LUCAS: May I make an offer of proof?

THE COURT: You may at a recess.

MR. LUCAS: I will do that then.

• • •

[R. III. 126-131] Q. In looking at page 196, look at letter "h". The statement is made there that there are great differences in white flight among cities. No one knows the policies (local/state, etc) which help control white flight. Would you agree with that?

A. Yes, I would agree with that. I don't know of any definitive studies that would predict when white flight would occur.

Q. Do you agree the white flight concept is to some extent a self-fulfilling prophesy when school boards predict it?

A. I think that influences some, yes. How many, I don't know.

Q. Are you aware that most of the so-called white flight in the country has taken place totally without regard to school desegregation?

A. I am not aware of that, no.

Q. What studies are you familiar with about white flight?

A. Very few.

THE COURT: Mr. Lucas, let me direct a question to you. Let's assume that a plan that will meet with the requirements of the remand encourages white flight and another one that does not meet with the requirements of the remand does not. Are you suggesting this Court has any choice?

MR. LUCAS: No, sir, I am not.

THE COURT: I was unaware of it also, and I was curious about this. Assume it either way. Assume that the differing plans will accelerate or decelerate white flight. This isn't a problem for the Court, is it? Isn't the Court required to approve a plan that will desegregate the schools?

MR. LUCAS: Your Honor, I think what the Court has to measure in deciding what plan to approve or what changes to make and so forth is whether or not rejecting particular alternatives the Board has done so on a basis which is legally proper, or whether or not that rejection, the choice of a less effective or an alternative which is demonstrably capable of actually desegregating the system is based on an impermissible factor. That is what Green spoke to. It may reflect on the

intentions of the body in particular instances. So, that is the purpose of the inquiry.

THE COURT: I don't see whether or not a plan will accelerate white flight which is obviously at this point speculative at best, no one is prepared to say what will, in fact, happen, and —

MR. LUCAS: Well, the defendants have, your Honor.

THE COURT: Let me finish, please. I am just concerned about the utility. It seems to me that the choice here does not bear upon social questions. The choice here depends upon effective desegregation, and this seems to me to be a social problem, and one that the Court is not confronted with.

MR. LUCAS: I think the theorum the Court is being presented with here is that plaintiffs' plan will obviously desegregate. They have rejected using the technique that plaintiffs' plan uses to desegregate because they say, and I am not agreeing with them, but they say it will cause white flight.

THE COURT: Well, your point, Mr. Lucas, as I look upon that, is irrelevant. I look upon these plans as to whether they, in fact, desegregate the schools, and that is all that I look to.

Now, it is appearing to me at this point I have a choice between techniques, because apparently both plans will accomplish the same purpose, and if they do then I would concern myself only with those things that are judicial in nature and not those which are social in nature.

MR. LUCAS: What we are suggesting is perhaps one of the plans before the Court is not capable of a determination that it will, in fact, desegregate the schools, and that is the issue we are testing here obviously for the next period of time, if you decide we may.

THE COURT: I don't think that is the criterion. I suspect, Mr. Lucas, that a question I addressed earlier to Dr. Gordon may be the key question, and that if the Court determines what I said is the bottom line, that is what the school components will be, that is going to be the test of whether a school is desegregated if I read Swan and Keyes correctly.

Now, this I believe is really a collateral question. It might

well be this white flight could be supported by some view as being a good thing. I don't know, and I could care less. I don't see that in terms of these plans of the preferability of one over the other whether it accelerates or decelerates that condition. I don't see that as a judicial consideration.

MR. LUCAS: Your Honor, I agree that the goal, the bottom line as you expressed it, is the purpose of us being here. The question I think that has to be measured is whether or not a particular plan is calculated, reasonably calculated to lead to that goal, subject to the Swan limitations, reasonable travel time and things of that sort. I am not sure that educational soundness, whatever that may mean, is one of the criteria. Mr. Greer keeps suggesting that is one of the three criteria.

I think health, safety and welfare of the child perhaps includes that, but I think the Court is correct getting into the educational theory, what is educational and educationally sound is a judgment that the Court indeed may not make.

THE COURT: I likewise feel that social problems are judgment calls that the Court may not make. I think that may be critical to our entire view of this problem. I see this as a judicial question regarding deprivation of constitutional rights. I don't see it in terms of social goods or social evils. That simply is not for a Court to determine.

MR. LUCAS: Well, my only purpose in examining is to test their theory as to why they rejected a proven effective method of desegregating schools.

THE COURT: I am prepared to assume it either way you prefer, Mr. Lucas, either that the Board's plan will accelerate white flight or that it will decelerate it, and I am prepared to consider your plan either way, and I still come out to the conclusion that that can't be relevant to the determination.

MR. LUCAS: I am really in agreement with the Court.

THE COURT: I would assume so.

MR. LUCAS: What I am arguing is they have used an irrelevant determination to reject a valid technique. That is where I am.

THE COURT: And I am prepared to agree with that. Now, let's go forward.

MR. LUCAS: Thank you, sir.

THE COURT: I am prepared to agree that they may have, but as I say, it doesn't make much difference.

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IV. RELEVANT PORTION OF STATEMENT OF PLAINTIFFS' COUNSEL MADE AT OPENING OF HEARING ON VIOLATION HELD IN NOVEMBER AND DECEMBER OF 1972.

[R. I. 11, Vol. 1] Further, it is not in controversy in this cause that the Dayton Board of Education in December of 1971 eliminated all the boundary lines which the Court sees on that map, and that it called for the adoption, according to certain criteria, of a desegregation plan but it first voided every one of those boundary lines and that the present Dayton Board of Education on January 3, 1972, reestablished the boundaries, in effect drew boundaries for the Dayton School System which boundaries are the same which result in the patterns of segregation which are reflected in the agreement as to the statistical enrollments in the schools at that time.

But for the action of the Board on January 3, those boundaries would not exist as they exist today.

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V. RELEVANT DESEGREGATION PLANS FILED WITH DISTRICT COURT.

A. PORTION OF PLAN SUBMITTED BY DAYTON BOARD IN COMPLIANCE WITH ORDER OF FEBRUARY 7, 1973.

(Title omitted in printing).

I. ELIMINATION OF OPTIONAL ZONES

A. Procedures

1. General

a. All students new to the changed district will be required to attend the newly designated school.

b. Students *may* change to the newly designated school in September, 1973.

2. High School Students

a. Students now attending high school may continue in their present school.

b. Any student who has completed the tenth grade who changes his or her address within the school district during the summer or the school year, may continue in the high school zone where originally enrolled.

3. Elementary School Students

a. Students in present grades K through five must change to newly designated district.

b. Students in present grades six and seven *may* remain in present school.

c. Any student who has completed the seventh grade in a school zone containing a K-8 school or any stu-

dent who has completed the fourth grade in a school zone containing a K-5 school who changes his or her address during the summer or the school year may continue in the school.

B. Optional Area Changes

1. Elementary

a. **Bell Haven – Ft. McKinley**

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b. **Valerie – Ft. McKinley**

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c. **Residence Park – Jane Addams**

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d. **Horace Mann – Lincoln**

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e. **Cleveland – Belmont Elementary**

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f. **Grant – Belmont Elementary**

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g. **Lewton – Eastmont**

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h. **Westwood – Jackson Schools**

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i. **Westwood – Carlson**

° ° °

j. **Carlson – Wogaman**

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k. **Highview – Wogaman**

° ° °

l. **Highview – Carlson**

° ° °

2. High School

a. **Fairview – Roth**

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b. **Belmont – Wilbur Wright**

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c. **Colonel White – Kiser**

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d. **Colonel White – Roosevelt**

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II. FREEDOM OF ENROLLMENT PRIORITIES

A. Revised Freedom of Enrollment Policy

1. Transfer Within District

The parent of a pupil in good standing enrolled in the Dayton Public School District may request assignment of the pupil to any school building within the district where space may be available to accommodate him. Such requests will be granted according to the following procedures:

a. Students residing within the attendance area of a school building shall have *first* priority to assignment to that building.

b. A student desiring enrollment in any building for whatever reason shall have *second* priority in that building providing his enrollment will contribute to improved racial balance in that building and providing that such transfer will not adversely affect the racial balance of the sending school. Schools will be considered racially balanced if they reflect the over all racial composition of the Dayton School District.

c. Students meeting the requirements for a course available only in the particu'ar building shall have *third* priority for attendance in that building and all students enrolling under this priority for the first time commencing with the 1973-74 school year and each year thereafter shall return to their home school upon completion of the course.

d. Transfer to another school within the city will be made only at the beginning of the first semester.

e. A permit to attend a school outside the attendance area of residence is valid until the end of the school year for which it is issued. It is *renewable on a year-to-year* basis depending upon availability of space in the receiving school. A student requesting renewed assignment shall have priority over new transfer requests. Students now attending a school building under the freedom of enrollment policy may continue their attendance in the assigned building where there is available classroom space without re-submitting an application. However, elementary graduates under the freedom of enrollment policy desiring a transfer for the purpose of meeting requirements for a course or improving racial balance must re-submit an application.

f. Excepting those students returning to their home schools upon completion of a course, students desiring to return to their home school district may do so at the end of the school year, unless an emergency situation arises, and will not be eligible for further free enrollment transfer.

g. An application for transfer may be obtained from the principal of the home school district or the Student Relations Office. All requests for transfer shall be mailed or delivered by the parent to the Student Relations Office for action.

h. Transportation will be the responsibility of the Board of Education for all students eligible and approved for transfer and who voluntarily transfer under Option b where racial balance is improved in the receiving school.

i. This transportation is granted on the same basis as other students being transported. Thus, elementary and middle school children who reside more than 1.5 miles from their schools of attendance, and high school students who live beyond 2 miles and are unable to obtain public transportation that will get them to the school of attendance within one hour, will be eligible.

2. Student Exchanges Within the City

a. Any two pupils, or group of pupils, attending schools within the district may voluntarily exchange places for a semester or a year if such exchange will improve the racial balance in the receiving schools and does not adversely affect the racial balance of the sending school.

b. Procedures shall be the same as for transfers as enumerated above.

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III. FACULTY ASSIGNMENT PRACTICES

Faculty assignments for each school in the Dayton Public Schools shall continue to reflect a racial composition that approximates the ratio of black to white faculty in the entire school system. The Superintendent of Schools is specifically charged with the duty of seeing that this policy is implemented.

Faculty personnel shall continue to be hired on a nondiscriminatory basis. It is the intent of the Dayton Board that every reasonable effort will be utilized to in-

sure that the percentage of black faculty, as related to the entire faculty in the system, will continue, at a minimum, at the approximate level that has existed in the system since 1970.

IV. HIRING POLICIES FOR CLASSIFIED PERSONNEL

A. Clerical, Custodial and Food Service Staff

The racial characteristic for the City of Dayton as reflected in the 1970 census tract is 31.0% black. The racial characteristic for the Dayton Public Schools is somewhat less than this since the zones embodying schools lying outside the City of Dayton are predominantly white in their racial composition.

The clerical staff of the Dayton Public Schools is currently 65% white and 35% black.

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The custodial staff of the Dayton Public Schools is currently 52% white and 48% black. The Food Service Staff presently employs 304 persons. Of these, 181 are white and 123 are black, with a ratio of 60% white and 40% black.

As for the clerical, custodial and food service employees, it is the policy of the Board that the employment of black minorities in these positions will continue to reflect the proportion of the black to white population residing within the Dayton School District.

B. Maintenance Staff

In December of 1972, the supervisor of the maintenance and transportation division, who was white, resigned. This vacancy was subsequently filled by a qualified black supervisor.

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In October of 1972, the Dayton Board of Education entered into a bargaining agreement with the Building Trades Council. A provision in this agreement created a new classification entitled "pre-apprentice trainee". Through the use of this classification, the Dayton Board resolves to integrate the maintenance staff.

Before June 15, 1973, the Board will hire five "pre-apprentice trainee" minority craft employees. Two electricians, two plumbers and one glazier will initially be employed.

Since there are presently eight maintenance craftsmen who have attained age 60 or beyond the opportunity for further minority employment will exist upon the retirement of these craftsmen. Additionally, further opportunity for minority employment will exist if the maintenance department is expanded or any existing craftsman terminates his employment with the Dayton Board.

It is the intent of the Dayton Board to integrate each union craft in the maintenance division. Every reasonable effort will be utilized to employ minority craftsmen, apprentices or "pre-apprentice trainees" in order that the black to white ratio within each craft approximates the proportion of black to white population residing within the Dayton School District.

V. SCIENCE ENVIRONMENTAL PROGRAM

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This plan proposes the establishment of a city-wide elementary science program guided by a trained staff of about 50 persons working in four centers. These staff members will be selected from the most active and innovative science teachers in the Dayton Public schools.

About 11,000 pupils in grades 5 through 8 and their teachers will make a field trip once every two weeks to a center designed and staffed to provide training and experiences as briefly described herein.

About 500 high school students will participate in the centers on a credit basis, to assist younger students in learning to use the science skills in solving problems.

Students in grades 1-4 will visit a science center once or more during the year.

A science-mobile will be used by students to simulate environments too distant to reach.

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The specific content of the program will be developed and promoted by cooperative effort of social studies and science specialists of the curriculum development department. The program will concentrate on concepts that relate to the natural environment, to the use man has made of the products of nature, and to man himself. In the program, these concepts may mingle in any one learning experience, so that the program becomes multi-disciplinary in implementation.

Children will be transported to the Environmental Centers on buses. A trained aide, speaking on an audio-equipped bus, will point out places of interest as the bus moves from the neighborhood school to the Center. Bus trips will vary for a class from time to time with routes chosen so that children may get comprehensive views of the entire city. Audio equipment on alternate backs of bus seats will encourage pupils to interact with the guides. The bus driver and the bus travel resource aide will serve as para-professionals in the course of the day's program.

Activities will vary with the grade level of pupils involved and the program planned for the day. Activities for the elementary grades will be directed toward a general ecological approach for developing environmental awareness. A multi-sensory approach will be used so that the pupil will be more "totally" involved in the activities. Trails and sites will be selected to meet the program needs which have been planned for the day.

Teachers of participating students will become part of the teaching team and will gain expertise in the ways to follow up activity in their home schools.

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The visiting students will be scheduled so as to represent a racial and socio-economic mix similar to that of the entire school district.

VI. PATTERSON-STIVERS VOCATIONAL HIGH SCHOOL

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Beginning in September of 1973 the facility presently designated as Stivers High School will be converted, over a three year period, to a co-operative vocational facility which will be known as the Stivers campus of the Patterson-Stivers Vocational High School. Ninth and most tenth grade students selected for the vocational program will be enrolled at the Stivers campus. The remaining tenth grade and all eleventh and twelfth grade vocational students will attend the Patterson campus (presently the facility housing Patterson Co-operative High School).

The students currently enrolled in grades nine through eleven at Stivers High School and the students of those classes moving into this geographical zone during such three year period will continue to attend Stivers until their respective classes graduate. As of September, 1973 all students residing within the present geographic boundaries of Stivers, with the exceptions as noted above will be assigned on an equitable and non-racial basis to Wilbur Wright and Belmont Highs Schools. The resulting realignment of the Stivers boundaries will provide for increased integration in the two receiving schools.

VII. THE MUSICAL STEREOPTICON

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The immediate objective is the formation of an elementary and high-school all-city band orchestra and chorus. Each performing group will participate in concerts and joint musical ventures with other students of similar interest and proficiency from all schools within the district.

Based upon the successful implementation of the foregoing musical groups it is proposed that the program be expanded in subsequent years to embrace additional musical involvement of students, parents, and citizens. Envisioned at the present time are combined school marching bands (with joint marching performances), joint school pep bands, rock groups, gospel choirs, jazz lab bands, and musical theater groups. The program will be expanded to add one of these groups annually over a six year period.

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Student participation in each group, will be based primarily upon ability and each group shall contain both black and white students. Prospective student members must be members of the musical group of their own school and will be selected for membership in the all-city performing group by the school director.

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VIII. INTEGRATED ATHLETICS

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1. All elementary schools having no minorities on their squads will be required to schedule league or non-league contests with schools that do have such minorities represented. All elementary principals and coaches will be apprised of plans before league organizational meetings are held in the fall of next school year. At that time this plan will be built into each league schedule.
2. Middle school principals and coaches will make up their athletic schedules. Such athletic schedules must meet the requirements set forth in paragraph 1 above. Because of location of middle schools in different parts of the city the middle school league will present a well-integrated schedule.
3. All high school league schedules will be administered from central athletic office to insure that racial isolation does not exist. In city championship meets all high schools will be entered against all other high schools.
4. Scheduling of all future invitational tournaments of any interscholastic sport will be done in a manner so that the participating schools will represent a cross section of the total Dayton community.

IX. MINORITY LANGUAGE PROGRAM.

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The purpose of a minority language program is to educate teachers and other school personnel to recognize specific legitimate linguistic differences that exist in many varieties of American English. This knowledge should aid teachers in the tasks of teaching reading and writing (in standard English) to pupils of different cultural backgrounds.

X. LIVING ARTS CENTER

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Students enrolled in the Living Arts program are self-selected. Interest, desire, enthusiasm, creative potential and a personal interview are the criteria for acceptance. During the spring semester of 1972, 843 students were enrolled in the program. Currently, the non-white enrollment approximates thirty-five per cent of the entire

enrollment. Including in-school workshops, combined programs at the center reach an average of 2,000 students per week.

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Basically, the Living Arts Center consists of five separate departments; art, creative writing, dance, and drama.

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XI. CONTROL CENTERS.

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A. Security — Rumor Control Center

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To accomplish such an educational program, an atmosphere and climate must be established within the schools which will be a supportive adjunct to the educational program. Community — school — parent involvement must become a constructive force in meeting problem situations and dispelling rumors. An organized ongoing Security-Rumor Control Center should assist in creating the climate necessary to meet the challenges of modern, universal, quality education.

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B. School Guidance Centers

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The Board of Education and staff of the Dayton Public School System are committed to providing a quality educational program for every boy and girl in the District. This philosophy includes all the children of all people, emphasizes the need to reduce school dropouts, and provides a program suited to each student's needs.

Historically, this aim has not been reached, and many students have found the school irrelevant to their needs. These students have dropped out or failed to enroll at all. In other cases economic deprivation has influenced

parents to withhold students from school. The conditions which create these problems must be attacked and the students who are being deprived of the opportunity for an education *must* be taught.

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C. Area Learning Centers

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The Learning Centers will be operated for students between the ages of thirteen through nineteen commencing with the 1974-75 school year. Young people who apply between the ages of nineteen through twenty-one, could be accepted with approval. One Center will be designated for students between the ages of thirteen through fifteen (generally grades 6th, 7th, and 8th), and the other Center will accommodate students between the ages of sixteen through nineteen and others who qualify with approval. The Centers will be for students whose parents or guardians are residents of the Dayton Public School District. The Centers are conceived to meet the individual needs of school dropouts or those deemed potential dropouts by their home school principal.

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D. Dayton Vocational School

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It is proposed that the Dayton Vocational School proposal will become a reality at the start of the 1974-75 school year. Educational training in occupational-type work is offered to suit various student needs and abilities at the Dayton Vocational School. *Coordinated Vocational Academic Education* is being provided for young men between the ages of fifteen and twenty-one, while *Vocational Rehabilitation Training* is offered for another

group composed of both young men and young women ages sixteen to twenty-one.

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B. PORTION OF PLAN SUBMITTED BY DAYTON BOARD IN COMPLIANCE WITH ORDER OF JANUARY 7, 1975.

(Title omitted in printing).

APPENDIX A

STAFFING

In 1969 the Dayton Board of Education indicated its intent to have the racial composition of the staff of each school in the district reflect the ratio of the black-white composition of the staff in the entire system. Although the goal has been attained, the Board recognizes the need for the continuance of this staffing policy. Consequently, the Board reaffirms that staffing assignments in each school will continue to reflect a racial composition that approximates the ratio of the black-white composition of the staff for the entire district.

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APPENDIX B

TEACHER IN-SERVICE

The purpose of teacher in-service as a segment of the desegregation plan is to provide training which enables teachers to work more effectively in newly desegregated situations. An estimated 200 teachers, comprising all faculty members new to the Dayton Public School District will be involved in the in-service programs. Additionally, teachers newly assigned to specific schools and those recommended by their administrators will be accommodated in accordance with space and financial limitations.

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APPENDIX C

ROOSEVELT HIGH SCHOOL

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Roosevelt students presently in the 9th, 10th, and 11th grades will be given the choice of Open Enrollment to attend the high school of their choice. These students will be given priority over any other Open Enrollment movements. Statistics indicate that if the school day is expanded from six one-hour periods to seven one-hour periods that there will be sufficient space in Dayton high schools to receive all Roosevelt students. This expansion will be done without affecting the present five period teaching day of teachers. Therefore, Roosevelt can close its doors as a comprehensive high school in June 1975.

APPENDIX D

DOWNTOWN MAGNET HIGH SCHOOL

and

SATELLITE MAGNET PROGRAMS

• • •

The magnet high school will be located in the downtown area so that all qualified students will have easy access to the formal facilities as well as to various agencies and institutions which will be utilized by the students in the magnet schools.

The satellite magnet schools located at Dunbar and Roth were selected because of their site location and their racial composition. It is the hope of Dayton City Schools that interested and qualified students from throughout the entire district will enroll in the magnet courses and thus reduce isolation at Dunbar and Roth. Moreover, the Dunbar and Roth facilities are adequate since there is ample accommodation for an increase in the student body as well as appropriate accom-

modation at the two sites for certain specialized courses which have been identified.

The combination of the Downtown Magnet School and satellite locations at Dunbar and Roth will attract a sufficient number of students throughout the city to reflect a more representative racial composition of the City of Dayton. In order to develop an academically and vocationally enriched magnet high school for qualified students, the administration will initiate a challenging course offering program which allows students to approach their potential and to insure the best use of available educational resources.

• • •

APPENDIX E

KISER CAREER CENTER

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Beginning in the fall of 1975, a variety of innovative vocational education programs will be implemented in the Kiser High School building. All programs will be operational by September 1976. Both new and remodeled facilities will house the programs. Programs in remodeled areas should be ready by September 1975 while those in extensively remodeled and totally new areas will be operational in September 1976.

• • •

APPENDIX F

THE STRUCTURED ALTERNATIVE ELEMENTARY SCHOOL

The primary emphasis in this school will be on basic academic skills and subject matter, the establishment of good study habits, and improved self-image resulting from academic achievement. The school will seek to build within each child a sense of responsibility, confidence, pride in that American heritage common to all, a strong respect for law and order,

and a healthy regard and tolerance for the rights of others. The school will provide the kind of quiet and orderly environment needed by many children in order to learn.

• • •

Enrollment at SAES will be open to all students in the Dayton City Schools. The final selection process will result in an integrated student body. Selection of students will be made according to guidelines developed by the Instruction Department in cooperation with the Student Development Department. Parents who send their children to the SAES will do so entirely of their own free will and in so doing must agree to abide by the established rules and policies of the school.

• • •

APPENDIX G

ELEMENTARY SCHOOL MAGNET PROGRAMS:

Intermediate Grade Levels

1. MODERN FOREIGN LANGUAGE

6th, 7th, 8th Grades

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In addition to offering instruction in such modern foreign languages as Spanish, German, or French, or one for which the community expresses a great deal of interest, a general language course will be offered.

• • •

In order to implement the program, transporting students to one site would be required. Carlson School has been selected. The school day can be divided into three blocks of time allowing for up to 360 students to be served. For minimal implementation of the program six (6) foreign language teachers will be required. Students will attend the foreign language magnet on days they are not scheduled for the science centers. Foreign language will be a voluntary study option.

2. BUSINESS EDUCATION SKILLS
6th, 7th, 8th Grades

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Many middle-school age youngsters will benefit from typing and other business education subjects, if available to them. For these pupils manipulative skills will be further developed, other disciplines understood and appreciated, knowledge gained concerning careers in business and all of its related fields, and a variety to the school curriculum provided which will enhance the holding power of the educational processes.

Youngsters who select this magnet will be transported from their home schools to the magnet site on the days that they do not attend the science centers. It is anticipated that approximately 300 students can be accommodated by this magnet in three time blocks per day.

• • •

3. CAREER MOTIVATION CENTER
4th and 5th Grades

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The basic structure of the program will give the students who elect to attend the Center the opportunity to explore four broad occupational groupings during the school year.

• • •

During the school year students will have the opportunity to explore four occupational groups. They will spend 4 hours per week (2 — 2 hour sections) at the center. Each of the four teachers at the center will have two 2-hour classes daily, four days per week. Each class will enroll approximately 25 students. It is anticipated that the implementation year 1975-76 this center will serve approximately two hundred twenty students.

• • •

Occupational Group Description

• • •

Group	Sub-Clusters
	• • •
I.	Business & office
	• • •
	Marketing & Distribution
	• • •
	Communications & Media
	• • •
II.	Animal Science & Agriculture
	• • •
	Environment
	• • •
III.	Foods, Housing, and Hospitality
	• • •
	Health
	• • •
	Recreation
	• • •
IV.	Construction
	• • •
	Manufacturing
	• • •
	Transportation
	• • •

APPENDIX H

(Other Programs)

1. EXPANSION OF SCIENCE CENTER PROGRAM

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Science programs in Dayton elementary and middle schools as in other large city schools, vary widely in sophistication. Books and other curricular materials are provided; however, facilities and equipment for science teaching and learning are

minimal in most buildings. The expertise of teachers in guiding the learning of children in science ranges from imaginative and exciting to the direction of pupils in reading science textbooks.

The Dayton Board of Education acted to improve this situation through the establishment of four Science Centers in 1973. The 3,500 youngsters attending the five day Dayton middle schools were exempted from the program. It is now proposed that these children participate in the Science Centers effective September 1975.

2. SCIENCE ENVIRONMENTAL CENTER

• • •

A sustained period of students inter-racial contact involving both a structured and non-structured situation where students can freely and naturally interact.

• • •

An outdoor camping experience proposes to provide for the establishment of an environmental program to involve all sixth grade students on a voluntary basis. A racially balanced group of approximately 60 students and their teacher will comprise one group of campers. By using two different camp sites, it is estimated that the entire 3,200 sixth graders will have the opportunity for this experience during the fall and spring sessions.

• • •

3. ALTERNATE SCHOOL PROGRAM for INTERMEDIATE GRADE LEVEL STUDENTS

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The Dayton Public Schools like most urban school districts today has a sizable number of sixth, seventh and eighth grade students who have either become alienated from the regular school program or who are experiencing academic

and interrelational difficulties to the point that early school leaving (dropping out) will probably be the outcome. A high percentage of those who drop out of school and into the world of the unemployed and unemployable are close to the age of sixteen. Invariably school records indicate that those leaving at this time experienced little success and varying degrees of alienation in the intermediate grades.

• • •

The program will involve 150 students representative of all kindergarten through eighth grade elementary schools and middle schools in the Dayton School District. The population will reflect the same racial composition as does the total Dayton school population and efforts will be made to balance the enrollment with regard to sex and to economic backgrounds of the participants. Prospective students will initially be identified by their home school administrator but the final decision concerning prospective enrollment will be made by a committee consisting of a school psychologist, the Director of Alternative Education Programs, and the project coordinator. Prior to enrollment an applicant, along with a parent or guardian, will be interviewed by the coordinator or his designee at which time the school's program will be explained. No student will be enrolled without parental permission. Also, all students will have the right to return to their home school at the conclusion of any semester.

• • •

4. SPECIAL NEEDS PROGRAMS

• • •

The following magnet programs serve the whole school community:

The Daytime Center

• • •

Handicapped Programs

• • •

Intergovernmental — Summer Program with City of Dayton

* * *

VEET (Vocational Exploration, Experience, and Training)

* * *

5. ORIENTATION AND REGISTRATION CENTER

* * *

In depth in-service for orientation and registration for all student services advisors, student action advisors and counselors will be provided, as will all information concerning all programs, courses and extra curricular offerings in the Dayton School System.

6. COMPONENT FOR MONITORING DESEGREGATION

In each component reference has been made to "reflecting the existing racial composition of the school district." The current racial composition of the Dayton school district is approximately sixty per cent white and forty per cent black.

In order to establish that these goals are being met, an advisory committee under the direction of the Superintendent of Schools, will monitor and make recommendations pertinent to the implementation of the components of the desegregation plan. The committee will establish its own monitoring procedures, but will report to the Board of Education, through the Superintendent of Schools, no less than quarterly. The initial life of the committee will be for three years. After this time, if the plan has been fully implemented, the committee will be reconstructed and will monitor less vigorously and report less frequently. It is anticipated that within four years, once the plan has been fully implemented and operational, the committee will no longer be necessary, and will be phased out.

7. ELEMENTARY ATHLETICS

To implement an integrated atmosphere for seventh and eighth grade interscholastic athletics, already present in the high school interscholastic athletics, programs will move toward city-wide seventh and eighth grade competition for the 1975-76 athletic seasons.

8. METROPOLITAN EXCHANGE PROGRAM

The Board will continue to explore voluntary metropolitan integration authorized in its January 1972 resolution. The Board recommends that every school district within a 15-mile radius of Dayton have the opportunity to exchange a number of student spaces in the Dayton District for a like number of student spaces in its district.

APPENDIX I

A METROPOLITAN EDUCATIONAL CENTER FOR THE COMMUNICATION ARTS

* * *

It is proposed that an educational center for the communication arts be developed for public and non-public juniors and seniors from the greater Metropolitan Dayton area, inclusive of all of Montgomery County. Students, who are recommended by their respective high schools, will select the subject area in which they wish to gain in-depth experience and receive specialized instruction. Many high school students complete their secondary curriculum requirements in three or three and one-half years and it is during the eleventh and twelfth grades that opportunity is provided for variation in schedule and program.

* * *

The career-oriented phase of communication arts education will attract students from every school, every section of the

total community, and will represent all racial and ethnic groups; racial balance will be maintained. Classes offered during morning and afternoon hours, flexibly scheduled, will accommodate 600 or more young people who can benefit by concentrated study and skill development in this rapidly expanding career field.

C. PORTION OF PLAN SUBMITTED BY PLAINTIFFS IN COMPLIANCE WITH ORDER OF JANUARY 7, 1975.

(Title omitted in printing).

* * *

Data for the current school year for the Dayton Public Schools indicate there are 47 elementary schools (Table I) with an enrollment of 28,588 pupils, 13,164 (46 per cent) of whom are blacks. There are 5 middle schools with an enrollment of 3,537 pupils, 2,431 (68.7 per cent) of whom are blacks. Eleven high schools enroll 14,820 pupils, 6,739 (45.5 per cent) of whom are blacks.

The elementary schools display a wide range of grade organization – prekindergarten through grade 2 (1); through grade 3 (1); through grade 5 (6); and through grade 8 (11); kindergarten through grade 3 (2); through grade 5 (3); and through grade 8 (19); grades 4 through 8 (2); grades 4 through 5 (1); and grades 3 through 5 (1). Middle schools house grades 6 through 8, and the high schools grades 9 through 12.

Sixteen of the elementary schools are over 90 per cent black in enrollment; 17 are over 90 per cent white. Five secondary schools are over 90 per cent black; two are over 90 per cent white.

* * *

TENTATIVE SAMPLE FORM
FOR HIGH SCHOOL APPLICATION

Name .....

Address .....

Class you will enter in September 1976:

Freshman .... Sophomore .... Junior .... Senior ....

High school attendance zone in which you reside .....

If you are currently attending a high school, indicate which one .....

On this form you will be asked to indicate three choice of high schools for September 1976. Be sure to read carefully the material below so that you will understand how to make your choice.

1. Juniors and seniors will be allowed to continue in their present school, if they so choose.
2. Except for Belmont-Dunbar and Wilbur Wright-Roth, all students who elect to attend the school in their attendance zone are assured that they will receive that assignment.
3. Any student may request attendance at any of the schools in the city, but only a very limited number of students will receive assignments to schools outside the attendance zone of their residence.
4. Students currently enrolled at Stivers-Patterson will be able to continue at that school, if they so choose.
5. Students residing in the Roth-Wilbur Wright zone and the Belmont-Dunbar zone should understand that these four schools will be desegregated in September 1976. Obviously many students residing in those zones will be assigned a school on the opposite side of the city from where they reside. Entering freshman and sophomores will be randomly selected for these assignments until the required quotas are met. Some students or groups of

students might prefer to volunteer for their assignment because in that way groups of students could be assured of being assigned to school together. Every possible convenience will be afforded students electing or assigned to a distant school, e.g., on time express buses, late afternoon and evening activity buses, and whenever appropriate, home-to-school and school-to-home delivery.

D. PORTION OF PLAN TRANSMITTED BY DAYTON BOARD IN DECEMBER OF 1975.

2. *RTA Transportation should be utilized more extensively in light of the lower cost.* This would be especially true at the high school level. Whereas, the new desegregation plan will necessitate some increase in the numbers of students requiring transportation, RTA should be utilized almost exclusively to handle such increases. A corollary benefit would accrue if the Board owned the St. John buses. The District could then utilize RTA to the maximum; even to the point of creating special routes and inaugurating new service, which they cannot now implement because of laws governing competition from the contractual line (St. John). If the Board acquired St. John, it could utilize RTA to streamline the total transportation program. RTA routes are such that all areas of the city are covered with no location, except too remote areas, more than .4 miles from a route.

3. *The utilization of taxicabs for transportation should be eliminated.* Two primary reasons justify this recommendation.

   A. It is extremely expensive transportation for the minimal results.

   B. It tends to create highly emotional feelings on the part of Black students. They react angrily when observing White students arriving at the Roth and Dunbar magnets via taxicabs. * * *

E. REPORT OF THE MASTER JOHN A. FINGER.

(Title omitted in printing).

On December 29, 1975 the Honorable Carl B. Rubin, United States District Judge, appointed me (John A. Finger, Jr. of Providence, Rhode Island) Master in the above titled action, directing the supervision of the redistribution of students on a school by school basis, and the establishment of attendance zones under the guidelines to be followed whenever possible.

Previously the Court had appointed me as Consultant to the Court directing the School Board to provide assistance and information as requested by the Consultant.

No hearings have been held in carrying out the duties assigned to the Master. One meeting was held with the attorneys in the case to inform them of procedures and activities being followed. As Master, my activities have consisted of meeting with School Board personnel, primarily the Superintendent of Schools and his executive staff, the reading and analyzing of reports and proposals prepared for me by the Superintendent and his staff.

Dayton, Ohio, a city of 243,000 is located in southwestern Ohio, some 50 miles due north of Cincinnati. The city is located in the east central part of Montgomery County, population 610,000. The standard metropolitan area, of which Dayton is the center city, has a population of approximately 850,000.

The Dayton School District is not coterminus with the city of Dayton. Portions of Harrison Township, Madison Township, Mad River Township and the village of Riverside are included in the Dayton School District. Some portions of the city of Dayton are in the Harrison Township School District, the Jefferson Township School District, and the Mad River Local School District. Appendix A is a map showing the Dayton School District and the city of Dayton boundaries. The Dayton School District has a population of approximately 268,000 and a school population of 45,000, of which slightly

less than 50% are black. With the exception of the Trotwood-Madison District, which is approximately 25% black and Jefferson Township District which is 80% black, the school districts in the Dayton standard metropolitan area are predominantly white. Of the approximately 170,000 students in the Dayton standard metropolitan area, less than 30,000 are black. Twenty-two thousand (22,000) of these black students are in the Dayton School District.

The Court's Order of Appointment limited my activities as Master to those of supervising the School Department in the development of new attendance zones and to reporting the numbers of students to attend each school, but I would be remiss in my responsibilities if I did not include some comments about my views on Dayton and its metropolitan area.

I have been subjected to a perspective on the school in Dayton from a variety of sources, a perspective which views many black neighborhoods as undesirable, and a perspective which recognizes that some white parents will be reluctant to send children to schools in these neighborhoods because of concern for the child's social well-being and perhaps for his physical well-being as well. Each person has his own perceptions through which situations are interpreted. I am glad to be able to report that I have not seen disorganized schools in Dayton. From what I have seen, parents should not be apprehensive for their children's safety and effective education in any of the schools in Dayton.

Many people have expressed to me their concern that unless some corrective action is taken Dayton will become increasingly black. Whatever the causes, the fact is that Metropolitan Dayton is predominantly white, but within it is a sector that is predominantly black.

I have made some brief studies of the history of Ohio School Districts and the laws and regulations pertaining thereto. Because historically Ohio had a great many small school districts, procedures have been established for the elimination and consolidation of districts. According to a United States Office of Education Report on the Statistics of State School

Systems (OE, HEW, OE 20020-66) in 1931-32, there were 2043 school districts in Ohio. By 1951-52 there were 1429 and in 1965-66 there were 738. In 1975 there were 617.

There are a number of authorized procedures for changing school district boundaries. The State Agencies, the State Board of Education, the County Board of Education, the Dayton Board of Education, and other local boards of education in and near Montgomery County can initiate procedures authorized by statute of the Ohio General Assembly to alter school district boundaries. In a state where there are a number of cities with extensive racial isolation, some of which are in desegregation litigation, one would have expected the State Board of Education to be actively involved in studies of the feasibility of achieving the elimination of racial isolation through alteration of school district boundaries, especially when such studies and resultant recommendations are specifically authorized by the General Assembly, but I believe none have been recently undertaken. Given too, the consequences for the entire area of increased racial isolation in the Dayton School District, one would think that all citizens in the metropolitan area whose center is Dayton, would recognize their stake, and would seek to assure the healthy development of the metropolitan area, yet neither the local boards nor the County Board acts. Indeed the facts may be that the metropolitan area schools are withdrawing from cooperative activities with the Dayton School District because they fear involvement in a metropolitan plan.

The Court is required by the Order of the Sixth Circuit to desegregate the Dayton School District Schools by September 1976. There are, however, some additional steps that the Court might consider.

The Court could direct the State Board of Education to submit proposals for the redistricting of the Dayton School District and surrounding districts.

The Court could direct the school boards of all districts, which are in Montgomery County and possibly Greene County, too, to submit to the Court a redistricting plan which

would bring each district to not more than 30% black with a view to providing district desegregation plans in which no school would exceed 40% black.

There have been proposals made by Professor James Coleman of the University of Chicago to utilize a voucher plan as a means of desegregation. Metropolitan Dayton might be an area where such a plan would be workable as one of several desegregation procedures for the area. The Court could direct the State Board of Education or some other state agency to undertake the detailed development of such a plan and could require the cooperation of the area local boards of education.

RECOMMENDED DESEGREGATION PLAN FOR DAYTON

Introduction

A desegregation plan must first comply with the mandates of the Court which establishes the guidelines for what is to be done, but one cannot be unmindful of the magnitude of the problems which can be encountered in implementing a desegregation plan.

For a plan to work effectively means that children will receive good educational experiences, and that the schools and the city will thrive and prosper. What actually will happen in Dayton depends upon the citizens in Dayton, and what they do both individually and collectively. Desegregated schools can be healthy learning environments where children and students share their common bonds as people and citizens of Dayton. To make desegregation not the end of the world, but the beginning, requires patience and tolerance and cooperation. Children will not be harmed because they are in desegregated schools, but each child and each student needs the assurance of parents and of the community that the program can function effectively. Even with the most efficient

planning there are bound to be problems. Each person needs to exercise restraint so that problems and confrontations can be resolved, rather than be magnified and intensified.

Desegregation plans differ in the way in which students are assigned to schools. While in some cities, desegregation requires only the alteration of attendance zones, this technique is neither feasible nor fair when the black and white communities are isolated from each other. For most of the elementary schools and for some of the high schools, there does not seem to be an alternative, except to pair schools.

Once the decision to use pairing has been made, several alternatives are available as to the method of assigning students to schools. A frequently used method is the grade assignment plan. In this procedure two paired schools, one in a white residential area and one in a black or minority residential area, serve different grade level students. One school might enroll only students in grades 1 through 3, and the other school in the pair enroll only students in grades 4 through 6. A slight alteration of grade assignment pairings would be to develop a new grade level organization such as 1-5, 6-8, 9-12 or 1-4, 5-8, 9-12, and select the schools to serve grades 5-8 so that all are located in one or the other of the black and white communities. To avoid having the younger children of one or the other communities being always the group bused away from their residential area, a city might be zoned into three or four large districts with the elementary schools (grades 1-4) being on one side of the city in one district and on the other side in another district. Where there are geographic barriers defining such districts such a procedure is most workable, for otherwise citizens residing in close proximity to each other would experience differing treatment. Some might have their elementary school children bused away from their residential area for four years, while others would have their middle school children (grades 5-8) attending school away from their residential area.

There seems to be widespread agreement among the administrative staff of the Dayton Board of Education that the

grade structure should be uniform with every elementary school serving grades K-8, and high schools enrolling grades 9-12. While some citizens might disagree with that decision, preferring to continue with the middle school organization, I have felt it inappropriate to not allow such decisions to be made by those responsible for the educational programs.

One provision of the Court Order indicated that children were not to ride school buses for more than twenty minutes, nor to be bused a distance greater than two miles, if it was possible to achieve this and still comply with the requirement of desegregation of the schools.

These suggested Court Guidelines cannot be met. Wherever feasible, schools have been desegregated by restructuring attendance zones so as to comply with the suggested Guidelines and so as to reduce transportation. Some paired schools are in close proximity to each other and the distances and travel times are within the suggested Guideline. Some paired schools are more than five miles apart. However, distance probably is not as important a criterion as time of travel. Despite the large distances separating some school pairs, the longest travel time should not much exceed twenty minutes. The School Board through its administrative staff should make every effort to minimize travel time and to provide maximum comfort and convenience for students.

Elementary School Pairing Plan

The plan for Dayton utilizes a unique method of pairing elementary schools. While some elementary schools in Dayton are to be desegregated by redefining attendance areas, others will be paired. In the paired schools each child will spend one-half of each year in the school near home, and the other half of the year in the other school. Thus, every child will be a member of two schools. The child will not change classmates nor teachers, but will at the middle of the year change buildings.

The advantages to this method of pairing are:

1. The child remains with the same teacher and classmates throughout the year.
2. Every child, teacher, and parent is involved in bringing unity to the two schools.
3. The procedure is fair to each person and each group without requiring an extensive system of keeping track of which child has been assigned a school away from home a previous year.
4. Parents of paired schools can work together to assure the maintenance of quality education, with all sharing concern for both schools. Some might construe as a disadvantage to this method of pairing the fact that teachers must change buildings at midsemester. Undoubtedly, this will be an inconvenience to teachers, but this inconvenience should be outweighed by the advantages of bringing the two paired schools together as a single unit.

The pairings will operate in this way:

1. During the summer or prior to the close of school this year, teachers and principals in the paired schools will decide which teachers will be assigned to the two schools in a pair. They will select the students who will make up each class.
2. When schools open in September, students will report to the school in their attendance zone. There will probably be a few days during which children stay in that school while the children are being selected for the desegregated classes.
3. One-half of the children in every paired school will be assigned to the paired school not in their attendance zone. When the program starts, the children will leave that school and go to the other school in the pair.
4. When they arrive they will meet the other half of their

classmates and their teacher whom they will be with for the year.

5. Bus routes will be established so that travel time between schools will be as short as possible. In some attendance zones all children will walk to their school and the buses run from school to school, but where it will be more convenient, pick up points will be established so that children will not have to first walk to school.

6. At midyear, the schools will close for a few days while teachers and some supporting staff move from one paired school to the other. When schools reopen, those students who had been attending the school in their attendance zone will go to the other paired school and vice versa. Their teacher and their classmates will be in that school.

Pairing Involving More Than Two Schools.

In some instances two schools are paired with one school. This arrangement does not alter the experiences of individual children or classes, for the children involved remain members of two schools. Where one school is paired with two schools, the administrative staff (principals and teachers) in devising the classes should select children so that for the most part, the children residing in the same geographic area are assigned to the same one of the paired schools. This does not require precisely defined zones. It rather is an informal arrangement so that neighbors in a geographic area have all of their children in the same two schools.

With but one exception in the paired schools, each school of the pair is almost exclusively one race or the other. Where there are but a few children of the opposite race in the predominantly one-race schools, those children are to be included in the pairing arrangement. The one exception is the Van Cleve district. The Van Cleve School is to be a dual function

school. One part of the school will be an integrated school that does not participate in the pairing. This part of the school will enroll approximately 350 students, half white, half black. The other part will participate in the pairing with Residence Park. The School Board may either rotate the white students on a yearly basis who are assigned to the integrated part or define a sub-attendance zone in the Van Cleve district, in which an integrated population resides and assign those students to the part of the Van Cleve School which does not participate in the pairing. If there are other similar situations, or if others develop, the above procedure should be followed.

SCHOOL ASSIGNMENTS

Northern Region

1. Many of the attendance zones in the northern region have been redefined. A Cornell Heights zone includes part of Fairport, Fairview, Jefferson, and Gardendale. Some of Jefferson is not in the northern district. Some of Jefferson is zoned to Fairview. Some of Hickorydale and Gettysburg is zoned to Belle Haven. The attached map defines the new attendance zones.

2. **Paired Schools:**

   Cornell Heights – Meadowdale
   Brown – Jefferson
   Shiloh – Fairport
   Loos – Fairport
   Gardendale – Valerie

3. **Schools desegregated by zone changes:**

   Belle Haven
   Fairview
   Hickorydale
   Gettysburg

Central Region

1. An extended zone including parts of Jefferson and Van Cleve has been defined for McGuffey, Webster, and Allen. A MacFarlane zone has been defined encompassing parts of Weaver and Edison. Weaver is to be closed. The attached map defines the new attendance zones.

2. **Paired Schools:**
   Huffman – Jackson
   Franklin – Edison
   Lincoln – MacFarlane
   Washington – MacFarlane
   Residence Park – Van Cleve
   Residence Park – Kemp
   Orville Wright – Westwood-McNary
   Ruskin – Westwood-McNary

3. **Schools Desegregated by Zone Changes:**
   Allen, Webster, McGuffy.
   An area formerly in the Jefferson zone is included with Allen, Webster and McGuffey. The School Department will assign these students so that each of the schools will enroll approximately the same proportion of black students. Some black students now attending McGuffey will be reassigned to Webster or Allen.

Southern Region

1. Irving area is rezoned. The Irving School is closed and the students assigned to the Whittier School.

2. **Paired Schools:**
   Grant – Carlson
   Drevel – Jane Addams
   Troy – Belmont
   Troy – Horace Mann
   Troy – Eastmont

Emerson – Whittier
Patterson – Whittier
Lewton – Highview
Cleveland – Wogaman

PROJECTED ENROLLMENTS

Northern Region

	Number of Students	% Black
Cornell Heights – Meadowdale	1250	53%
Brown – Jefferson	1750	51%
Shiloh – Fairport	700	45%
Loos – Fairport	800	45%
Gardendale – Valerie	625	54%
Belle Haven	825	42%
Fairview	750	45%
Hickorydale	325	51%
Gettysburg	425	55%

Central Region

	Number of Students	% Black
Huffman – Jackson	1025	50%
Franklin – Edison	1100	43%
Lincoln – MacFarlane	1300	49%
Washington – MacFarlane	625	49%
Residence Park – Van Cleve	1100	47%
Residence Park – Kemp	900	47%
Orville Wright – Westwood	900	47%
Ruskin – Westwood-McNary	1100	51%
Allen	900	44%
Webster	850	44%
McGuffey	425	44%

Southern Region

Grant – Carlson	800	48%
Drexel – Jane Addams	850	45%
Troy – Belmont	800	44%

Troy – Horace Mann	325	44%
Troy – Eastmont	775	44%
Emerson – Whittier	725	50%
Patterson – Whittier	725	50%
Lewton – Highview	575	49%
Wogaman – Cleveland	1675	47%

Note: Some of the facilities at Miami Chapel or another nearby school may be utilized in addition to the Troy Elementary School

Special Programs and Schools

Handicapped and Special Education Programs

Programs for handicapped students and special education programs as well as the Occupational Work Adjustment and Alternate Middle School programs will remain in their present locations or be relocated at the discretion of the Board of Education. Students assigned to these programs need not be involved in pairing. Kindergarten students will attend the school in their attendance zone or will be assigned to other nearby schools at the discretion of the Board of Education.

Magnet Schools

Miami Chapel will continue as an open enrollment magnet school with a specialized structured curriculum.

Longfellow will be an elementary school serving grades 1-8 or other grades if the Board of Education deems that appropriate. Longfellow will have a special Individual Guided Educational Program.

Any elementary level student is eligible to attend either of these schools. The Board of Education should try to accommodate requests for enrollment in these schools. However, the Board is not required to run an extensive transportation network to honor all requests, nor is the Board to allow the basic pairing structure of the desegregation plan to be come imbalanced because of enrollment in these schools. The target

population for school enrollments should be 50% black and 50% white, but the Board may allow additional enrollment within the Court Guidelines. Additional open enrollment magnet schools may be operated if applications so warrant, but these are subject to the above strictures.

Magnet Programs for Grades 6, 7 and 8

In the current school year a number of middle schools are in operation. Students not attending middle schools are presently allowed to elect the magnet programs so that they have a considerable amount of choice available to them which pro.ides a diversity of programs.

The onset of desegregation during the 1976-77 school year creates some difficulties with these magnet programs because the students being bused between paired schools would be bused again to attend magnet programs. Arranging transportation so that students would attend a magnet program on the way to or on the way home from a paired school could partially but not completely alleviate this problem. With the upper elementary grades, grades 6, 7 and 8 being assigned to elementary schools, rather than larger unit middle schools or junior high schools as is the usual practice elsewhere, some special provisions need to be made for this group of students.

The school administrative staff has not yet completed its plans for the location and operation of its magnet programs. These programs will continue and be so located as to minimize transportation and provide convenient program availability for all students.

RECOMMENDED DESEGREGATION PLAN FOR HIGH SCHOOLS

The Dayton administrative staff acting under my direction has submitted some suggestions to me for the high schools. Especially endorsed and commended are their proposals to continue the Alternate Learning Center, the Downtown Mag-

net High School, the Job Training Center, the Kiser Career Programs, and the Citywide Cooperative Programs at Stivers-Patterson. The proposal to create a Metropolitan Education Center for the Communication Arts (MECCA) is an excellent one. I have reviewed that proposal in considerable detail and believe it is truly an innovative and valuable project. Funding for this project is only partially assured. Since this would be a school to serve Metropolitan Dayton, I recommend that the Court direct the County Boards of Education of Montgomery and Greene Counties, the State Board of Education and the Dayton Board of Education to jointly prepare a proposal for the funding and implementation of MECCA.

The Dayton Board of Education has initiated programs in Computer Technology at Dunbar High School and Communication and Mass Media at Roth High School. These programs have not attracted many students, in part because they have been phased in during the current school year. In the long run the desegregation of Roth, Dunbar, Belmont, and Wilbur Wright high schools will depend upon these schools providing meaningful and effective programs for all students and upon specialized programs being offered in these schools which will attract diverse populations to them.

The Dayton Board of Education should prepare and submit a plan for locating more unique and specialized programs in these four high schools so that students can make meaningful selections among these schools.

While it may not be possible to effectuate much program change by September 1976, the Board should develop long-term and short-term program strategies for these schools.

The recommended plan for desegregating the high schools in Dayton primarily utilizes attendance zones, but a rather involved procedure must be established because there are exceptions to the general rule that students will attend the high school in their attendance zone.

The exceptions are:

a. Students who will be juniors or seniors in September 1976 may continue in their present high school.
b. Students may apply to the non-zoned schools, which are Stivers-Patterson, and Kiser (grades 11 and 12).
c. Some students in the Dunbar Zone are to be assigned to Belmont, some in Belmont assigned to Dunbar, some in Wilbur Wright assigned to Roth and some in Roth assigned to Wilbur Wright.
d. Some transfers to high schools outside a student's attendance zone may be permitted when the transfer aids desegregation.

There have been extensive discussions with the school administrative staff as to the procedure to be followed in assigning students to Dunbar-Belmont and Wilbur Wright-Roth. One proposal was to sub-divide each of the attendance zones of Belmont, Roth, Dunbar and Wilbur Wright high schools into two parts, an A Zone and a B Zone, and in alternate years to assign students on a rotating basis from these sub-zones to one or the other of the paired high schools. Even though it fulfiills the Order of the Court this sub-zoning procedure of the administrative proposal has some shortcomings, the most serious of which is that it reassigns more students than is necessary.

My recommendation is for a procedure that would have all students be given choices of high schools. These choices would be accommodated, where possible. When the choice could no longer be accommodated, students would be selected randomly for their assignment. This selection procedure would be repeated each year, but students entering their senior year in a high school would have the right to continue in the school they attended the previous year. This procedure seems to me to be fairer to individual students, and to gradually allow specialized programs to be developed, which would attract

an integrated student body to the currently segregated high schools.

Obviously in the coming year many students in the Belmont-Dunbar zone and in the Roth-Wilbur Wright zone will be required to attend the more distant school, for it seems unlikely that sufficient students will choose schools in the proportions that meet the Court Guidelines. There could be considerable voluntary choice for the more distant school since students or groups of students might prefer to volunteer, and thereby be assured that present groups of friends are not broken up by a random selection process.

The number of students to be reassigned would be as follows:

	Entering 9th Grade	Entering 10th Grade
From Belmont to Dunbar	225	225
From Dunbar to Belmont	150	150
From Wilbur Wright to Roth	200	150
From Roth to Wilbur Wright	125	125

The procedure for establishing high school attendance is further clarified in the following pages, which consist of a preliminary sample form which would be completed by all students, who will be in high school in September 1976. The sample form is tentative for it needs careful examination by the school administrative staff to assure that all contingencies have been included. The School Board, not the Court, would provide the assurances of transportation efficiency and convenience indicated on the sample form.

The procedure of random selection of students does not exclude the possibility of assignment by geographic areas. After students have made their choices of high schools and the assignments have been made based on these choices, the School Board administrative staff could determine the number of students which must be reassigned between Dunbar-Belmont and Wilbur Wright-Roth. They could then define an area, several areas, or a number of small areas containing

the proper number of students and the students residing in these areas would be reassigned.

If you reside in the Roth, Wilbur Wright, Belmont or Dunbar zone and you *volunteer* for an assignment to the more distant school, you will be making a commitment for only one year. At the end of the year you may request a different assignment. In that case your name would be placed in the random assignment pool. If your name is drawn, you would continue at the more distant school. Those who for September 1976 are randomly selected for assignment at the more distant school will have that as a permanent high school assignment.

Please complete the remainder of this form.

If you are currently enrolled in a high school, do you wish to continue in that school? Yes ..... No .....

Irrespective of how you responded above, please indicate your choices of high schools below.

My first choice is .....
My second choice is .....
My third choice is .....

PROJECTED ENROLLMENTS FOR HIGH SCHOOLS
SEPTEMBER 1976

	Total Enrollment	% Black
Belmont	2100	23%
Dunbar	1400	68%
Fairview	1000	54%
Kiser	900	35%
Meadowdale	1900	47%
Roth	1250	78%
Stivers-Patterson	2800	55%
Colonel White	1300	65%
Wilbur Wright	1550	32%

Note: The Freshman and Sophomore classes at Belmont, Dunbar, Roth and Wilbur Wright will have the following estimated enrollments:

	Total Enrollment	% Black
Belmont	1150	34%
Dunbar	800	44%
Roth	575	47%
Wilbur Wright	900	40%

ADDITIONAL CONSIDERATIONS AND RECOMMENDATIONS

Transportation

An efficient transportation system is very important to assure the effectiveness of desegregation. Long, crowded bus rides, late buses, or lack of buses for after-school activities, create discontent which may be directed at the Court or desegregation rather than at an inefficient transportation network. Students are entitled to as much convenience as can possibly be afforded them. Students should not be penalized by inability to attend after-school activities because of new school assignments.

The School Board should complete a preliminary transportation plan as soon as feasible reporting their overall plan to the Court in sufficient detail to show whether sufficient buses are available to provide the needed transportation.

Safety of Students

The School Board should work with law enforcement agencies to prepare contingency plans to assure the safety of all students. The School Board should informally describe to the Court their progress in developing contingency plans assuring themselves and the Court that law enforcement officers are adequately briefed and trained.

Training of Teachers

The School Board is to make certain that all teachers are adequately prepared to deal with the new situations which will be encountered. If there are special problems in training teachers for the desegregation program which warrant the Court's consideration, it should be informed of the needs and problems and of the possible ways in which resolutions can be effectuated.

Continuation of Services to Students

Federal funding regulations under Title I sometimes result in individual students losing eligibility for special services. The School Board should make every effort to see that students are in no way deprived of services as a result of their reassignments. The Court should be informed if there is an inability to provide needed services, indicating what steps needs to be taken.

Funding for Desegregation

Throughout the nation, urban centers tend to have higher tax rates than surrounding areas. The problem of providing adequate funding for all services, including education, becomes exacerbated when the tax base of cities erodes. Dayton is no exception to what seems to be the general rule of higher city taxes. Intervention in this problem is difficult, but the Court needs to be continually apprised of the funding situation. The Board of Education has made applications for federal funds and seems assured that sizable funds will be available. However, like other governmental agencies, the Dayton Board of Education has a limitation on the availability of contingency funds of the kind necessary to support the specialized services which are needed in carrying out school desegregation. A successful educational program in Dayton is essential to assure citizen satisfaction. The Court may wish to request regular reporting by the School Board on its financial condition.

VI. RELEVANT PARTS OF THE RECORD OF THE TWENTY VOLUMES TRANSCRIBED DURING THE VIOLATION HEARING HELD IN DISTRICT COURT IN NOVEMBER AND DECEMBER OF 1972 (R. I.).

A. TESTIMONY OF HUBERT D. POORE.

1. Commentary of Trial Court and plaintiffs' counsel.

* * *

[R. I. 148, Vol. 2] MR. DIAMOND: Your Honor, let me make two points clear. First of all, in at least – there are four project applications. In at least three of them there is a statement by the DMHA of the availability of space and the accommodation of nearby schools, schools in the area, or the need for new school capacity to serve these projects.

Earlier in the day I introduced into evidence and read to your Honor the statements by the Dayton School Authorities in relationship to other projects in those instances, not necessarily related to these four particular projects, of their creation of new schools and classrooms to serve the pupils of these populations of these projects.

THE COURT: Mr. Diamond, I am aware that for a substantial period of time so-called public housing, financed by agencies of both the Federal Government and local Government, were specifically designated, some were white and some were black. This is insufficient for our purposes.

If you wish to present this evidence as to these projects, I am sure that it will state therein for whom the occupancy was intended.

* * *

[R. I. 160, Vol. 2] [The Court] Mr. Diamond, you simply have not passed the first hurdle with this witness, and until and unless you do the Court is going to rule that this is not admissible.

Now, if you have a necessity with this witness and other

witnesses demonstrating some participation by the school board, unless that participation in the determination of the character, the occupancy of these projects, until that is established I am going to hold he may not testify.

MR. DIAMOND: Well, I guess what I am having difficulty understanding, Your Honor, is that in terms of a lease agreement the school authorities are the ones that made the lease.

THE COURT: There is no question about that.

MR. DIAMOND: They are the ones who said we are going to lease that space and make it either a black school or a white school.

THE COURT: Well –

MR. DIAMOND: They are the ones who made the agreement.

THE COURT: Mr. Diamond, until you can establish that the School Board participated in some fashion with the original determination that this would be a white or black project, whatever else the Board might have done, they have taken the area as they found it. * * *

[R. I. 202-203, Vol. 3] MR. DIAMOND: Well, Your Honor, what I was going to show through this witness is that he is a parent of a child, he had a family when he moved here, and I was going to ask him from his recollection about specific incidents relating to his school children and neighbors.

THE COURT: This witness has been called as an expert to testify as to policies and I have permitted that. I am not going to permit his testimony as to individual recollections going on 27 years ago.

You may be seated, Mr. Greer.

MR. DIAMOND: Your Honor, Mr. Poore would testify to the fact that there were white children transported from the Wogaman School attendance area to the Jackson School attendance area in the 1945 school year.

* * *

2. Poore testimony.

* * *

[R. I. 152, Vol. 2] "Question: Mr. Poore, what do those four applications represent in terms of the racial identification, first of all, of the projects? Let's take particularly the DeSoto Bass project where you were located in 1945 when you came on."

A. Well, the proposed Metropolitan Housing Plan, it says the project proposed for race or national group was Negro; and this project, in addition to the present, Negro occupied, which was OH-52, which we had 200 units already there.

Q. Now, to your knowledge, Mr. Poore, while you were at the DeSoto Bass project, were your projects – while you were at DeSoto Bass, were they used for School purposes?

A. Yes, they were.

* * *

[R. I. 156, Vol. 2] Q. With reference to the other project applications in addition to this DeSota, do they show the intended racial occupancy of the project?

A. Yes, they do.

Q. And could you in each instance describe what the intended racial occupancy was?

A. Summit Court is for white; Edgewood Court was for white; and Parkside Homes was for white.

Q. With reference to Edgewood and Summit, do those documents reveal the racial composition of the particular spot upon which the project was to be located and from which people would have to be removed?

A. Yes, it did.

* * *

[R. I. 183, Vol. 3] A. 143D is surveys of the colored population of Dayton; there is the colored population, the census, and the number of units in DeSoto Bass Court and the temporary housing, which was known as War housing.

For instance, there was 200 for the DeSoto Bass Courts, but

the addition of 200 was for the temporary addition. 60 for the second addition to DeSoto Bass Courts, 160 of the Homeview Courts, and 80 for Lakeview, 50 for the dormitory at Phyllis Wheatley and 100 additional dormitory for girls.

Q. Were all these projects designated for black occupancy?

A. Those were designated for black.

* * *

[R. I. 184-185, Vol. 3] A. G? This is data on the War housing application for the past six months, which is dated November 5, 1945. It gives the number of white applications, excluding Vandalia, and then it gives the number of applications for the Vandalia area, the number of Negro applications.

Q. Why is it divided into those three columns?

A. Well, all the white applications except Vandalia were filed in an office downtown, and the black applications were all filed at the DeSoto Bass Courts, and Vandalia homes, which was located in Vandalia, that they made application there.

Q. Was Vandalia homes a white project?

A. Yes, it was.

* * *

[R. I. 187-188, Vol. 3] Q. Does PX-143J include lease agreements with the Dayton Board of Education?

A. Yes, it does.

Q. And were lease agreements made for space in the DeSoto Bass and the McGuffey Homes?

A. Yes, it does.

Q. Now, what was the racial designation of the McGuffey Homes?

A. It was white.

Q. And DeSoto Bass?

A. Black.

Q. Now, when you were – was it Executive Director of the DeSoto Bass Courts?

A. I was Project Manager.

Q. Project Manager, excuse me. I am sorry. I got the language wrong.

Q. When you were project manager at the DeSoto Bass Courts, when these lease agreements were in effect, were black pupils and black faculty assigned to that leased space?

A. Yes, there was.

* * *

[R. I. 213-215, Vol. 3] Q. Mr. Poore during the period of these lease agreements with the DMHA to use the building for school purposes, the DMHA didn't control or influence the assignment of pupils or faculty, did they?

A. No, they did not.

Q. That was within the control of the Dayton School Authorities?

A. That's right.

Q. On the lease agreement that Mr. Greer just referred to, did you find a copy of that?

A. Yes, I found a copy.

Q. And what form is that? Does it have a form number on it at the very top?

A. That's SP1913.

Q. And would you read the first line of that, the underlined portion of the heading of the lease agreement?

A. At the very top, you mean?

Q. Yes.

A. "Lease or tenant activity and other non-commercial use on Federal War Housing Projects by Federal local authorities."

Q. And is that a form by either the Federal or State authorities? I am speaking of the Federal Housing Authority.

A. I would say it is probably Federal. I am not for certain.

Q. And at that time War housing was required to be segregated on a racial basis?

A. Yes, it was.

* * *

B. TESTIMONY OF RUTH ANNETTE WILLIAMS.

[R. I. 215, Vol. 3] Q. Would you state your name, please?

A. Ruth Annette Williams.

Q. Would you state when you first arrived in Dayton and became an employee of the Dayton Metropolitan Housing Authority?

A. In early 1942.

* * *

C. TESTIMONY OF HOMER ROYER.

* * *

[R. I. 229, Vol. 3] Q. Do you recall telling the HEW team that investigated the school system that one of the reasons for putting black teachers on substitute status at first was because of the questionable nature of some of their qualifications because of graduation from southern institutions?

A. I don't remember making that statement. I may have made it.

Q. Would it be true?

A. There would be some institutions about which we had little information.

* * *

D. TESTIMONY OF PHYLLIS B. GREER.

* * *

[R. I. 348, Vol. 4] A. Well, I remember that in the '30's youngsters were being bussed from Shawn Acres to Garfield School, so it would have to have been prior to that time, sometime prior to that.

Q. And the youngsters who were being bussed to the Garfield School, were they black or white?

A. They were all black.

Q. And was the Garfield School a black school or white school?

A. Black.

Q. Do you know what school they would have attended had they attended the school zone in which the school was located?

A. No, I don't remember the closest school to Shawn Acres.

° ° °

[R. I. 476, Vol. 5] Q. Now, when your testimony ended, I believe you were at the map showing the Judge where the Garfield School was with relationship to the transportation of Shawn Acres.

° ° °

Q. What was Shawn Acres?

A. Shawn Acres was a Children's Home.

Q. And did it have both black and white pupils?

A. Yes.

Q. Now, could you step to the map with the Court's permission and show the Court where the black pupils went to school?

A. Yes.

° ° °

THE WITNESS: Shawn Acres is located up in the area of Loos School and the students from Shawn Acres were bussed to Garfield School which is three blocks from McFarlane School on Fifth Street.

° ° °

[R. I. 481-494, Vol. 5] A. (Continuing.) I was a student at Roosevelt those three years prior. Blacks were not allowed to go into the swimming pools, blacks had separate showers, so we requested from our parents to be allowed to go to Dunbar.

One of the assistant principals at Roosevelt at that time came to our home and asked that we not be permitted to go

to Dunbar because they wanted all the nice colored children to stay at Roosevelt, but we did go to Dunbar.

Q. And why did you go to Dunbar?

A. I went to Dunbar because I felt that if there was going to be — if we were going to be separated by anything, we might as well be separated by an entire building as to be separated by practices.

In fact, when I went to an eighth grade social studies class I was told by a teacher, whose name I still remember, I won't quote it but if I am asked to I will, that even though I was a good student I was not to sit in the front of the class because most of the colored kids sat in the back.

Q. Now, Mrs. Greer, while you were at the Dunbar High School, in terms of a separate building, were there other types of separation from the rest of the school system?

A. Well, when I went there in 1933, and certainly when I graduated in 1936 and when I went back to teaching in 1940, our athletic teams did not compete with the white schools in the city. Our athletic teams competed with other schools out of the state, even, that were black.

Q. Now, when you first — after you finished college — where did you go to college?

A. I went to Wilburforce University from '36 to '40.

Q. And when you returned to the Dayton Public Schools where were you assigned?

A. Dunbar High School.

Q. And at the time of your assignment were there any black teachers teaching white pupils?

A. No.

Q. And how long did you remain at Dunbar?

A. I remained at Dunbar from '40 to '45.

Q. Now, during that period of time, around 1945, are you personally aware of the faculty assignment that took place at the Wogaman School?

A. Yes, I am.

Q. What was that?

A. When school closed in June of 1945, there was an entire white staff at Wogaman. When school opened in September of '45, there was an entire black staff at Wogaman under a black principal, Robert Braxton.

Q. And at the same time were white pupils who lived in the Wogaman area transferred by bus out of the Wogaman School?

A. Yes.

Q. And where did they attend school?

A. They attended Jackson School.

Q. So that in the 1945 school year, '45-'46 school year, Wogaman had an all-black staff and all-black pupil population?

A. Yes.

Q. Now, while you were at Dunbar were black youngsters ever transferred there from Roosevelt?

A. Yes. I taught several black youngsters who had been behavior problems at Roosevelt and their parents, upon enrolling them in the school, —

• • •

Q. Would you state —

A. The disruptive black students from Roosevelt were assigned to Dunbar.

Q. And, to your knowledge, were any of these disruptive black students assigned to any other high school in the system?

A. Not to my knowledge. I could not verify that or deny it.

Q. Now, when did you leave the Dunbar School as a faculty member?

A. I left Dunbar School on maternity leave in '46.

Q. And what happened after you returned from your maternity leave?

A. We had to have two years. When I went back and asked to get the job — I was told when I left that the teacher assigned to teach English in my place would be on a permanent substitute basis. When I went back the teacher had been assigned as a regular classroom teacher. I was told that

there were no English spots in Dunbar, there were no French classes in Dunbar that I could fill in, and was asked to go to Willard School to teach on a temporary certificate until there was an opening at Dunbar in English or French.

Q. And at that time you had a high school certificate in English?

A. Yes.

Q. And French?

A. Yes.

THE COURT: Excuse me. Mrs. Greer, how long had you taught at that point?

THE WITNESS: I had taught from '40 to '49.

THE COURT: Didn't you have tenure?

THE WITNESS: Yes, but I was not really assigned to the school in which I — I was given a job. I was assured a job.

THE COURT: All right. Thank you.

BY MR. DIAMOND:

Q. And you were assigned to what school?

A. Willard.

Q. And that was in an elementary capacity?

A. Yes.

Q. And what grades did you teach at that school?

A. I had a fourth year class of students who — they had taken an overflow of students from DeSoto Bass Courts, who came from DeSoto Bass to Willard to school. There was an overflow at that time from DeSoto Bass and those youngsters were — one of those classes was the class I taught at Willard.

Q. What schools was the Willard School closest to?

A. At that point in time, I am not sure because Miami Chapel had not been built. It was the closest school at that point in time to Wogaman, but there were other schools equal distance or closer, one school.

Q. All right. Thank you.

Now, Mrs. Greer, have you on various occasions both for HEW investigations and for investigations by Dr. Carle, and on requests by Plaintiffs examined the faculty directories from your own personal knowledge?

A. Yes. I was asked to do that by Title 6 Office the first time.

Q. At that point in time what was your position in the school system?

A. I was working at that point in time with the Office of EEO, the final months of the Office of EEO.

Q. And from your examination of these faculty directories, can you state from the beginning and describe the pattern of faculty assignments?

A. Yes. The first directory that was available is a 1921-22 directory. At that point in time there were seven black teachers in the Dayton School District. All of these teachers were assigned at Garfield.

From '31 to — from '21 to '31 the number had grown to 10 black teachers.

Q. And where were they assigned?

A. They were at Garfield and one black teacher, other than Garfield, a teacher, Maude Walker, was assigned to Weaver but she had an un-graded class and she had an ungraded class of all black boys.

Then in 1933 there was then again the largest number of blacks hired and these teachers were hired as staff people for Dunbar High School.

In 1950 or '51 a teacher was assigned, a black teacher was assigned to Weaver School.

In 1955 two black teachers were assigned to Jackson School.

Q. Now, let me interrupt you one moment. You have testified about the racial change both in terms of pupils and teachers at the Wogaman School.

Now, could you describe for me the racial change in teachers at the Garfield and Willard Schools in the mid-1930's?

A. In 1934-35 these directories show there were 10 black teachers and six whites at Willard School. And then in '35-'36 that staff became all black.

The next year, '36-37, there were roughly 38 percent white teachers at Garfield and —

THE COURT: I am sorry. What —

THE WITNESS: '35-36.

THE COURT: Excuse me. 38 percent white teachers?

THE WITNESS: There were 38 percent black teachers.

THE COURT: Black. Thank you.

A. And then the year '35-36, that staff became all black.

Q. And during those same periods of time did the pupil populations become all black?

A. Yes.

Q. At these two schools?

A. Yes.

Q. Fine. Now, could you continue through? We were at 1951 and we had teachers assigned to Jackson in terms of black teachers assigned to the Jackson School.

A. Yes. There was from that time on gradual assignments of black teachers in schools that had some white students in them. However, in going through our directories we found that these black teachers were assigned to schools that were already becoming black as far as the elementary grades are concerned.

I think that we were able to substantiate that in 1955 a black teacher was assigned — a black high school teacher was assigned in a school where it was not completely black.

Q. Now, Mrs. Greer, could you look at Plaintiffs' Exhibit 130D, it is the 1960 school year.

Now, during this period of time, from the early 1960's through 1968, am I understanding you correctly that you think black teachers disproportionately were being assigned to black schools while at the same time schools with black pupil populations in terms that they were beginning to increase or had increased in black pupil population and white teachers were being assigned disproportionately to virtually all white pupil populations?

A. As I look at Exhibit 130D, this indicates that that was the case. We have all black — high percentage of black student body at Dunbar and high percentages right down the line to indicate where there were high percentages of black

students we did have high percentages of black teachers and vice versa. This is the case.

Q. Now, throughout this period 1951 to 1968, were there many teacher assignments, both white and black, in terms of teacher turnover, transfers, and new hires?

A. I could not verify that there were. There were always constantly new teachers coming in.

Q. So at the same time you had this pattern of assigning black teachers to schools that were becoming black, white teachers, new teachers or transfers, were being assigned to white schools?

A. Yes.

Here again, we don't want to go into the area of hearsay, but it was generally – it was felt by those of us who were teaching – I felt – let's put it on this basis, I felt –

• • •

A. I felt that schools with predominantly black student bodies constantly receiving black teachers identified us as being black schools.

• • •

Q. Mrs. Greer, what was the effects in terms of the assignments of the black teachers to the schools that were becoming black and white teachers to white schools?

A. As a parent, I had a daughter going to Roth High School when the staff was relatively an integrated staff and so was the student body. But as more and more black youngsters came to Roth High School, the staff became increasingly black, and my concern was to have my daughter involved in a school situation that would help her to live in a pluralistic society, and I felt I was being denied this privilege.

Q. Now, in retrospect, when you look at the situations that existed in 1933, '34, '35, '36, in the Garfield and Willard and in the Wogaman Schools as the type of thing that you are describing – from 1961 to 1968 did occur, is there any relationship between those two?

A The relationship as we were able to establish by the assignments of staff indicated that as the student body became black, staff also became black separating the schools.

Q. Now, after you came back from maternity leave in 1949, how long did you stay at the Willard School?

A. I stayed there from '49 to '58.

Q. And where were you assigned then?

A. I was then assigned as principal at Carlson School.

Q. And was that the year the school opened?

A. That is correct.

Q. And what was the racial composition of the school when it opened in terms of pupils?

A. I think – I remember correctly that the student body was 213 youngsters, and we had about ten to twelve white students.

Q. And what was the faculty composition?

A. Totally black.

Q. And in 1953, when the Miami Chapel School opened, what was its pupil composition?

A. Black.

Q. And faculty?

A. Black. There was one white teacher.

Q. And at the Belle Haven School which opened in 1954, what was the pupil composition and the racial composition of the staff and pupils?

A. The pupil composition was a hundred percent white and the staff was a hundred percent white.

Q. And in 1957, when the Louise Troy School opened?

A. It was black, with I think – with the exception I think about maybe 95 percent black and the entire student body was black.

Q. And in 1958, when the Shoup Mill School opened –

THE COURT: I am sorry, Mr. Diamond. Which one?

MR. DIAMOND: Shoup Mill.

THE COURT: Shoup Mill. Thank you.

A. Our records substantiate that the staff was a hundred percent white as was the student body.

MR. DIAMOND: Your Honor, may I note for your attention Plaintiffs' Exhibit – I believe it's PX-3 or 4 which shows new schools opening and additions to schools showing pupil composition and staff composition at the time of the opening of the school and with the addition to the school.

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[R. I. 497, Vol. 5] Q. Then if we move up to the Washington Elementary School District, there is a black neighborhood in that area on Springfield Street that has existed for many, many years in Dayton, is there not?

A. Yes, because I remember many of those youngsters came to Dunbar High School when I was a student there. They came all the way from that distance to Dunbar High School.

Q. Which they have the option of doing, as I understand it?

A. Well, yes, they had the option of doing that then but nobody else had a like option.

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[R. I. 502, Vol. 5] A. It was interesting, however, since you are just asking for that purpose, to note that the optional areas between Roosevelt and Colonel White did do an excellent job of siphoning off white students that were at Roosevelt.

Q. All right. And right now, the students who are living in that optional area north of all of these natural boundaries are largely black people, are they not?

A. Right now, yes.

Q. And the effect of that option is to permit them to go to Colonel White High School, is it not?

A. I don't know whether it is or not, but I do know, as I said before, at the time when I was closely involved with

Roosevelt, it did do the job of siphoning off whites. Of course, the neighborhoods have changed.

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[R. I. 515, Vol. 5] Q. And as the neighborhoods changed, the compositions of the schools serving those neighborhoods changed?

A. Yes. But I would certainly like to re-emphasize that assignment of staff to go along with the neighborhood change was the kind of thing that gave the impression of the schools designed to be black, because black staff increased as black student bodies increased.

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E. TESTIMONY OF MARY WHITE.

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[R. I. 389-395, Vol. 5] Q. Just state your name and occupation, please, ma'am.

A. Mary Louise White, Executive Secretary to the Superintendent.

Q. Miss White, how long have you been with the Dayton Public Schools?

A. I came to the Dayton Public Schools in September of 1961.

Q. Where were you employed at that time in the system?

A. I was employed as a secretary to the Assistant Superintendent for Personnel.

Q. And that's Mr. Royer?

A. Right.

Q. Were you acquainted, Mrs. White with the records kept in that office with respect to teachers?

A. Yes. It was a two-girl office and each of us were responsible for records, filing and keeping records.

Q. Can you describe for me at the time you came to the office in 1961 the method of keeping records relating to the substitute teachers?

A. Well, it was kept in a file folder. When they were employed, it was put into a file folder and there was a code a mark for the black substitute teacher.

Q. Have you at my request by subpoena brought some examples or an example of those files with you?

A. Yes, sir.

* * *

Thereupon, the document referred to was marked for identification as Exhibit 158.

Q. In the substitute records can you tell me what color cards were used for white teachers and what color cards were used for black teachers or was there only the indication of the dot?

A. Just the indication of the dot.

And may I show this, Judge Rubin?

THE COURT: Yes.

A. This was the card that was kept at the call desk. This is where the calls were made for substitutes. It likewise had the same designation.

Q. All right. Now, when you say at the call desk, can you tell me what the call desk was?

A. Well, of course, we are a large system and our calls come into a central call center for substitute service. At the time I started it was a switchboard. The switchboard operator handled these with the aid of an assistant part time.

Then we reached a point where we needed a fulltime substitute service office, and we now have that designated within the personnel department.

Q. So the cards of the jacket which you just demonstrated with the blue dot were maintained at the call desk?

A. It was maintained in the personnel office. The one that is inside, this happens to be a former teacher, a former substitute.

Q. I see.

A. This was kept at the call desk.

Q. That would be the jacket?

A. The information on what subjects this person could teach as well as certification and this type thing.

Q. Would you illustrate the other card to the Court?

A. The other system that was kept –

Q. No, I am sorry. Is there another card for the substitute other than the one you have just illustrated?

A. No, but for regular teachers. The other cards describe –

Q. For regular teachers?

A. Yes, our applications for regular teachers.

Q. Now, the blue dot does indicate a black teacher, is that correct?

A. Yes, that is right.

Q. How long were these records kept in that office, or how long were you familiar with them?

A. They were there as long as I was there.

Q. And that was through what date?

A. From September of 1961 through – well, it was the latter part of July of 1967.

Q. All right. Now, what about regular teachers?

A. The regular teachers applications came to the personnel department and, of course, we kept a cross-card file. This was a buff card. It was by subjects in alphabetical order, and the regular buff card was for the white teachers, and then we had blue cards with the subjects listed for the black teachers.

Q. Did you also have pictures of the teachers on the cards?

A. No, not on the cards. The only time a picture was kept was after employment, when a person was on the payroll.

Q. And you have a picture of the file?

A. After employment, yes.

Q. In other words, even if the dot had been removed or you had different colored cards, you could still identify the race of the teachers?

A. Yes.

Q. What was the practice during that time with respect to the assignment of the substitute teachers?

A. As far as I know, and of course the substitutes were called from the other switchboard, as I said, it was a practice that black teachers – black substitutes went to black schools and whites went to white schools, as was common with the assignment of regular teachers.

Q. Now, were black teachers sometimes sent as substitutes to white schools?

A. Yes.

Q. You say this was a general practice?

A. Yes, sir.

Q. With exceptions?

A. Yes, sir.

Q. Were you personally aware of these assignments, and, if so, could you tell me how?

A. Yes. I was personally aware of the assignments. We were a small office. We each knew the other's job, and in times of illness I pinch-hit for someone else who did the calling.

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[R. I. 398, Vol. 5] Q. And insofar as regular teachers are concerned, the buff and blue cards situations you have referred to ended in '63, to the best of your recollection?

A. To the best of my knowledge it did.

Q. Now, were you the person that was in charge of these personnel records or was the other girl?

A. The personnel records were a matter that was shared. The substitute teachers' cards were primarily the responsibility of the clerk-typist in our office, but of course we were a two-girl office and we each knew the other's position and we did interchangeably work in each other's positions.

• • •

[R. I. 401, Vol. 5] A. That was the practice.

Q. And do I understand correctly that the reason for the blue dot on that card was that sometimes you would get specific requests for black substitute teachers?

A. That is correct.

Q. And those requests would come from school principals, I take it?

A. Yes.

• • •

Q. Just to clear one matter up, you said the purpose for the cards was if you got requests for black teachers. Did you also say the practice was assign black substitutes to black schools and whites to white schools?

A. To the best of my knowledge, it was in my early days there.

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F. TESTIMONY OF ROBERT L. GREEN.

[R. I. 433, Vol. 5] Q. Dr. Green, I believe I informed you that the faculties were desegregated as a result of HEW action in 1970.

Do you have an opinion as to whether or not the effects of this history of faculty assignment persist in terms of identification of schools as black or white in the school district after the changing of the faculties as was done in this case?

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A. Yes. The answer is yes, Mr. Lucas. When there has been historical practice of placing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentialy uni-racial or predominantly black or predominantly white.

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[R. I. 463, Vol. 5] Q. All right. I think I understand that point and the only point I am trying to make which I think I also understand from your testimony is that the actual faculty structure of the school doesn't really have the same kind of effect on the community perception of the school as the student population.

A. It doesn't have a full effect. It is important to desegregate a faculty, but it does not change the full perception of the community of that school.

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[R. I. 465-467, Vol. 5] Q. Now, you were asked a whole list of examples of schools. I think it started with Weaver in 1951-52 with 69 percent black students and a majority white faculty at that school, and you indicated the school would be identifiable as black because of its pupils. I believe the opening question related to a staff situation that I gave you that Weaver and several other schools in the period of 1951 to 1956-57 had the assignment for the first time of black teachers to the schools and that those schools, in fact, were the schools in the Dayton School System that already had the largest number of black children.

A. That's correct.

Q. And to make sure that the precise question is asked in the context of Dayton where the rest of the schools have white faculties and white student bodies, does the assignment of the black teachers to those schools as opposed to other schools with white children in a community accelerate or does it affect the perception of whether or not that school is intended to be a black school?

A. Not at all.

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[R. I. 468, Vol. 5] Q. To make sure we are together on the example, schools that have the largest proportion of black pupils and the other schools have no or have very few black pupils.

A. As a matter of fact, this could well and perhaps does facilitate that school in becoming perceived as being a black school or black area if I might use that term.

Q. But in another context assuming you knew nothing about faculty, these schools would be perceived as black instead of white?

A. Indeed it does have a label of a haven for blacks or one reserved for blacks.

Q. And if in association with that same school and assignment patterns, whites were permitted to transfer out into some optional areas, does that tend to label this changing school as a black school?

A. Yes, and it facilitates the pattern of segregation.

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G. TESTIMONY OF ROBERT REESE, SR.

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[R. I. 529-533, Vol. 6] Q. How did you get to school?

A. Walked.

Q. You walked across the bridge and the river separates that where you lived and the Central School; does it not?

A. Yes, sir.

Q. You walked across the bridge and got to that school; correct?

A. Yes, sir.

Q. Take your seat.

Did there come a time, Mr. Reese, when someone at the School Board found out that you were attending Central with a false address?

A. Yes, there did.

Q. What happened?

A. Well, they sent us home from school and told us we had to go to Garfield School, my sister and I.

Q. Did you go to Garfield School then?

A. No, I didn't go.

Q. Why didn't you go?

A. Well, my father didn't want us going out there in those frame buildings, so he filed a suit against the Board of Education and kept us out of school one year.

Q. You say out there in the frame buildings, can you tell me what was in the frame buildings?

A. Classrooms were black students and black teachers.

Q. And was there another building on the Garfield site?

A. A brick building with white teachers and white students.

Q. So, your father didn't want you to attend the black segregated classes; is that correct?

A. Yes.

Q. And he filed a lawsuit. Did you subsequently get into the brick building?

A. After they won the suit the following year because he died the 29th of June in 1925 and in September of 1926 I returned to Garfield in the brick building.

Q. All right. Did they still continue to operate the all-black classes and black faculty in the back of the brick building?

A. Yes, sir.

Q. And were they there after you finished your elementary school at Garfield?

A. When I left and went to Roosevelt, they were still there and still operating.

Q. While you were in the Garfield School, did they have any black classes during subsequent years in the brick building?

Q. After you left the Garfield School, where did you go?

A. Roosevelt.

Q. When you were at the Roosevelt School, did you participate in all school activities?

A. Football.

Q. Did you play freshman football?

A Yes, sir.

Q. Was there any separation of the races in connection with that?

A. Well, we had separate locker rooms, separate showers, and they had what they called the east and west swimming pools, and the white boys swam on one day and black ones swam another day.

Q. You did not swim in the same pool together at all; is that correct?

A. Yes.

Q. Did you leave Roosevelt after that?

A. When Dunbar opened, I left Roosevelt and hightailed it over to Dunbar.

Q. And why did you go to Dunbar?

A. I wanted to be free. I felt more at home at Dunbar than I did at Roosevelt.

Q. Why is that?

A. You couldn't segregate me at Dunbar.

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Q. At Roosevelt, Mr. Reese, the classes that you attended were integrated and had both black and white in them, did they not?

A. Right.

Q. And the football team on which you played had both black and white players on it, did it not?

A. Right.

Q. The practices you indicated as far as the separate locker rooms, showers and pools terminated by 1950, did they not?

A. I wasn't there in 1950.

Q. So, you don't know when they terminated?

A. I don't.

Q. Now, when you were attending Central Elementary School under a false address in the early '20's, you were in mixed black and white student classes there?

A. Yes.

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H. TESTIMONY OF JOHN HAREWOOD.

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[R. I. 565, Vol. 6] Q. Would you state your name, please, sir?

A. John Harewood.

Q. What is your present position with the Dayton Public Schools?

A. Assistant Superintendent in charge of administration.

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[R. I. 570, Vol. 6] Q. During the period from 1943 to '45, did you have a foster daughter in the Dayton Public Schools?

A. Yes.

Q. And where did she attend school?

A. At Wogaman Elementary School.

Q. And during that period of time was there any change in the pupil composition and racial composition of the black faculty and pupils?

A. Not '43. Did you say '43?

Q. '43 to '45.

A. No, not during that time, no.

Q. And was there shortly thereafter?

A. Yes. In 1945, when they appointed a black principal there, then there was a change.

Q. And what happened?

A. At the end of the spring — end of spring session they had an all white faculty and they appointed a black principal. In the fall they had a black principal and an entire black faculty there, black student body.

Q. Were there white children still living in the Wogaman attendance area?

A. There were.

Q. They did not attend the Wogaman School?

A. They did not.

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[R. I. 576, Vol. 6] He showed me a stack of applications that were all black. There were some with Master's Degrees, wives of people who worked at the Air Force Base and others, and we looked through those and we would comment what fine applicants they were, and the tragedy was that out of that many I needed one or two, and they were just there, yes.

Q. Separate pile of black applications?

A. Yes, that's right.

Q. Did your school ever have tuition pupils?

A. Yes.

Q. Could you explain for the Court what that means.

A. Pupils who live out of the Dayton School District who by paying a fee which is stipulated by the Board of Education could enroll in a particular school in any particular class if there was room in that school or class for them. And if they made arrangements through the Pupil Personnel Department for enrolling in the school, then they could become tuition pupils there.

Q. They had to be approved at the Central office?

A. Yes, that's right.

Q. And during what periods of time, and give me roughly what number of pupils and the race of those pupils who attended your school on a tuition basis?

A. Pupils, they were all black, tuition pupils who attended. I can't give you specific numbers . . . .

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[R. I. 582, Vol. 6] He asked me was I interested.

I said on those conditions, that's a position that my qualifications made me eligible for, then I would accept the position if it was offered to me, and under those conditions I was then appointed as Director of Secondary Instruction Curriculum for the Dayton Public School System.

Q. During the period of that appointment did one of the schools in the system have a fire?

A. Yes. Edison School had a fire during the time I was

serving as Director of Secondary Instruction Curriculum. Yes, sir.

Q. What did you do? How did you decide to take care of pupils in the spaces that had burned down?

A. The decision was not mine. I did not sit on the Executive Committee at that time. I was called in because of the problem we faced in reference to housing black children because of the fire.

At the meeting there was brought in from the Business Department a list of rooms in churches in the neighborhood of the Edison School, and they were trying to decide the best method for housing the children in the schools because the fire had been held.

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[R. I. 583-584 Vol. 6] Q. When those children were transported, where were they assigned within those schools?

A. I don't remember all the schools to which they were assigned, but one thing which was disturbing was the fact that in some school situations they were transported as a class with the teacher and came into the new school not as a part of the new school but still maintained their same identity as a class in the school to which they were assigned.

Q. In other words, there would be totally black-contained units in white schools?

A. That's right.

Q. Were you consulted on that decision?

A. No, that was not my decision.

Q. In view of your experience, your present experience, and your years of experience with both elementary and secondary education, was that decision to segregate those children educationally justifiable?

MR. GREER: Objection, your Honor.

THE COURT: Sustained.

MR. DIAMOND: Your Honor, I believe that Mr. Harewood has testified that he has been with the school system

some 35 years; that he now is the Chairman of Administration —

THE COURT: Mr. Diamond, you have had testimony as to what occurred. These classes were transported into literally a black enclave, and that is what I am concerned with.

Whether there were the best of reasons or the worst of reasons, or no reasons at all, we wind up with that fact, and that so far as I am concerned, is all the Court is considering at this time.

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[R. I. 590-592, Vol. 6] A. I refer specifically to the desegration of the staff which has occurred and the alternatives and my recommendations in regard to it.

BY MR. DIAMOND:

Q. Then, with respect to pupils as well?

A. Yes. I had a very strong feeling, and I indicated it to teachers and principals, to others who would listen that any desegregation of staff was not addressing the real problem of segregation of pupils which exist in the Dayton Public Schools.

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THE COURT: Whatever he recommended I am interested in hearing. What his thoughts were and his reasons I am not interested in hearing in this • • •

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Q. The Edison School, was it reconstructed after it burned?

A. Yes.

Q. And when the Edison School reopened, what was the racial composition?

A. All black.

Q. And what alternatives were considered to reopening the Edison School as an all black school?

A. The alternatives was to make it an early childhood center.

Q. And what would have been the racial composition of the Edison School as an early childhood center?

A. Black and white, but I don't know about the ratio because it would depend on how many children would attend.

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[R. I. 595-599, Vol. 6] Q. Mr. Harewood, let me make it clear that I want you to sort of list the alternatives and, if you will, I will ask you something further about them.

A. The alternatives that were considered and discussed in Executive Council and recommended by me in the discussion, were such things as pairing schools, magnet schools, looking again at the available classrooms in some schools, and since the responsibility for pupil assignment and teacher assignment was inherent in the superintendent's responsibilities, to look again and see if the assignment could be made that would bring about integration of some of the students in the schools. Also —

Q. Go ahead. I am sorry. I didn't mean to interrupt you.

A. Also in the general discussion we mentioned the fact that teacher desegregation should always be accompanied by pupil desegregation if we are going to address the problems which face us because of the segregation of pupils.

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Q. Mr. Harewood, since the HEW office had directed or had found that the system was in non-compliance with Title 6 of the Civil Rights Act of 1964, and the school system was about to commence a faculty plan of desegregation, what recommendation, if any, did you make with respect to timing of pupil desegregation?

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Yes. The recommendation which we made in reference to that act was that if it could not happen simultaneously with teacher desegregation, that as soon as possible after that pupils

should be desegregated in order to address the problem which faces us.

Q. You say "address the problem which faces us." What problem are you speaking of at this point? I want to make sure I understand.

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A. The problem that the Dayton Public School faces because of the segregation of the pupils in the school.

Q. All right. You recommended that they proceed – the pupil and faculty desegregation proceed simultaneously, if possible, or if not, shortly thereafter?

A. Yes.

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Q. You understand, Mr. Harewood, I am not asking you to tell me what is right or wrong about segregation, but I am asking you to deal with mechanics if you will. That is probably an unfortunate word. Will you try and answer the question in that context?

A Mechanics?

Q. What was the object of the faculty decision? What was the goal to be accomplished in a narrow sense, if you will?

A. So that we would no longer have schools which are identifiable by race because of the composition of the student population or the faculty population or the administrative assignments.

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[R. I. 608-609, Vol. 6] Q. Now, to go back to just a few points in your testimony, I understand that you were at Dunbar from 1938 to 1954; is that correct?

A. Yes.

Q. It was during the period from 1943 to 1948 that Dunbar became integrated into the City Athletic System; is that not correct?

A. 1948 and '49, they became, those two years.

Q. Didn't they start with training in '43, or do you remember?

A. Probably, yes, sir. I was speaking of the major sports. There may have been some activity in sports, yes, sir.

Q. But the two major sports are, of course, basketball and football in Dayton; aren't they?

A. That's right.

Q. In 1948 Dunbar became completely integrated into the City Basketball Leagues?

A. Yes, that's right.

Q. Then the following fall it became completely integrated in the City Football Leagues?

A. That's correct.

Q. And that has been the situation ever since; has it not?

A. That's right.

Q. You indicated that as a counselor at Dunbar from 1949 through 1954 you visited the area schools that would potentially feed children to the Dunbar High School?

A. Correct.

Q. In those days, and up to 1962 I think it was, Dunbar was an optional school; was it not?

A. Yes, sir.

Q. In other words, a child anywhere in the City System could elect to go either to the high school in his neighborhood or could elect to go to Dunbar?

A. Yes.

Q. The only other school with a city-wide attendance district at that time was Patterson High School; wasn't it?

A. Yes.

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[R. I. 611, Vol. 6] Q. The children who had been in class during that school year up until the time the school year burned down were transferred with the schools intact to these various predominantly white schools?

A. Yes.

Q. Then it was the start of the school year the following fall when those students became integrated into the other classes existing at those white schools; isn't that right?

A. In some instances some of them did it right away. Some waited. Some didn't do it until the next fall.

Q. How much time was left to complete the school year class that those children had with their teachers at Edison when the Edison School burned down?

A. I am not sure of the exact date, Mr. Greer, and the year when that happened.

Q. It was sometime in the spring?

A. In the spring, yes.

Q. Wasn't it a month or two before school was due to let out?

A. That's right.

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[R. I. 778-780, Vol. 7]

(Thereupon, the following proffer was made into the record by Mr. Diamond out of the presence of the Court:)

Mr. John Harewood, if permitted to answer whether it was educationally justifiable to segregate the children from the Edison School for the last six weeks of school to white schools would have testified as follows: From his experience as an elementary principal, second curriculum coordinator and second local chief administrative officer of the school system, would have testified that there was no educationally justifiable reason for segregating these children in the classes intact with their black teachers in otherwise virtually all-white schools.

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If permitted to testify with respect to the reasons for his recommendations with respect to faculty and pupil desegregation, Mr. Harewood would have testified as follows: First, the

faculty and pupils should be desegregated simultaneously or in as close coincidence as possible.

Second, that from his experience with the patterns of segregation and discrimination directly resulting from and being opposed by the Dayton Public School System and its accommodation of the white community's hostility to association with blacks on an equal basis, that when pupil desegregation was not made part of faculty desegration it was a symbol of the fact that the white community was still hostile to and unwilling to accept pupil desegregation.

If permitted to testify to the reasons for the January 3rd, 1972 action of the Board in reimposing segregation and redrawing every boundary in the school system which had the effect of establishing the substantial duality in pupil populations on a racial basis that is now present, Mr. Harewood would have testified that such action was merely the most overt act of discrimination and segregation by School Board action; and further would have testified that such overt act was necessitated because of the Board's decision on December 8, 1971 for the first time to come to grips with its own responsibilities to eradicate the patterns of discrimination and segregation which it had caused in substantial part for the past 50 years.

Mr. Harewood further would have testified that faculty desegregation given the history of identification of schools as black or white, and intentional tailoring of schools to serve white pupils or black pupils by the racial pattern in faculty assignment would not disestablish the racially dual system of education imposed by public school authorities.

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I. TESTIMONY OF ELLA LOWREY.

[R. I. 620-631, Vol. 6] Q. And where did you teach?
A. Garfield Elementary and Wogaman Elementary.
Q. All right. While you were a student in the system,

did you become familiar with the Garfield Elementary School?
A. No, I did not.
Q. When did you first become aware of the Garfield Elementary School?
A. When I met Miss Louise Troy who was teaching there.
Q. And do you know under what circumstances she was teaching physically? Was it in the main building or elsewhere?
A. I knew she was teaching a class of first and second grade black children in the brick building right at the rear door in a classroom there.

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Q. Can you give me the approximate date?
A. Well, I would say this was just before the flood years.

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About 1912 or 13.

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Q. And she was teaching in an all black class and Mrs. Troy is black?
A. Yes.
Q. In the brick building at that time?
A. Yes.
Q. Do you know what happened to that class thereafter?
A. I lost track of what she was doing because I finished high school and started going to Dayton Teachers Normal and I lost track of her until I finished Dayton Teachers Normal and went to teach myself.
Q. That was in 1918?
A. Yes.
Q. And when you went to teach Garfield, where were the black students being taught?
A. In a two-story frame building with four rooms that was a converted four-room house, two rooms down, two up with a stairway in the center.
Q. Were there any black students in the brick Building?
A. Not at that time.

Q. And were the teachers as well as the students black in the frame building?

A. All of us were black.

Q. Can you tell me what happened in the way of growth of for want of a better term I will call it the black annex to the Garfield School? Did you have an increase in enrollment during this period of time you were teaching?

A. When I went to do my practice teaching there where all the black Normal School girls went, there were four classrooms, a first and second grade in one room, third and fourth in one room, fifth and sixth in one room, seventh and eighth in one room. The classes were very large running about 50 children.

Q. Is that 50 children to one teacher?

A. To one classroom and one teacher. The next year, in 1918, that summer, they put up a two-room portable frame building with big stoves in it to heat them and I was hired along with another young woman to take a single second and third grade. I had third. The other girl had second, and this relieved the double classes in one room.

Q. Now, you taught —

A. At that point in time, that made six black teachers with six black classrooms.

Q. You were teaching in the portable portion of the building; it that correct?

A. Yes. The brick building sat here (indicating), here was the big yard (indicating), here sat this house (indicating), and on the other side of that was the frame, the two-room frame building.

Q. Were your classes large at that time?

A. At that time, when I began, I think I must have had about 25 or 30 children.

Q. Did there come another expansion in enrollment of children in the annex?

A. Yes, and it happened very fast. I would say it was due to the fact that after the flood, blacks moved out of the inner city proper, as we term it now, going west to go up

high out of the flood territory where we had had the flood, and they were moving fast into the west side, further west.

Q. Was there another addition built to this annex?

A. We stayed in this small frame, I can't tell you how many years, but being very fragile, the building being very fragile, it was soon delapidated, in bad condition. The walls were bad; the windows were bad and broken out, and the heating unit became bad.

Then they build what I would call a permanent building directly behind this frame house. I say permanent because the floors were concrete, there were toilets in the basement; furnaces in the basement, an iron stairway to come up from the outside into the building. That was for four rooms.

Then the two-room portable was torn down. At that point in time then we had eight black classrooms with eight black teachers.

• • •

Q. You say '21 and '22, you mean the years?

A. Yes, and at that same time the white teacher in the brick building with all white children had 20 children and I had 42. There was no effort made to equalize our classes. I kept 42 and she kept 20.

Q. Were you there in 1927 at the time the Reese case was filed?

A. Yes, I was.

Q. You were teaching still in the annex or the wooden building; is that correct?

A. Yes, I was, and Mr. Reese didn't like this thing, and he said he would not send his children there. They would not permit his children to go into the brick building, and he said he would not send them across the river to Central School. He would sue the School Board first, and he kept his children at home.

Now the School Board at that time, not knowing what was going to happen, hired we eight people on a day-to-day substitute basis in September.

Q. You say eight people?

A. Eight teachers. There were eight black teachers of black classes.

Q. Where did they hire you as substitutes? You had been hired previously?

A. Yes.

Q. Where were you hired as substitutes on a day-to-day basis?

A. They told us that they didn't know whether we would be there after the case was settled or not. If the case was settled and they had to admit black children to the white classes in the brick building, then there would be no reason for us to be there, we were told.

Q. You would not be permitted then to teach the white children?

A. No. This is what we were told.

Q. The case was finally disposed of. Were you then given contracts?

A. We were given contracts and given the retroactive pay that we lost from September until December.

Q. Did you know what happened to Mr. Reese's son?

A. He came on to school and went to the classes in the brick building.

Q. How did the black children get into the brick building after that?

A. They had to go to the administration building, the parents had to go and make a special request that their child be admitted to this brick building, and a little later in time, shortly after that went on for a while, people objected so to it, then they were permitted to bring their child to Garfield School and asked permission to have their child entered in the brick building, but the parents had to come into it.

Q. And ask the principal?

A. They had to ask the principal, "Place my child. I want my child placed in the brick building."

They had to come and so specify.

Q. If they did not do that, and they lived in the Garfield

zone, they would have been assigned to the black annex; is that correct?

A. They were assigned to the black teachers in the black annex and the black classes.

Q. Did the black population continue to grow and did in turn the number of white pupils available in that area decrease?

A. There came a time in the late '20's when we just had more children than we could handle and the weight seemed to be in the fifth and sixth grade area. At that time one black teacher was hired and she was given a room right at the rear door of the brick building. She was the first black teacher to work in the brick building at this time.

Q. Other than Mrs. Troy?

A. Mrs. Troy, in the meantime, was over in the frame building with us. Now that was in, I would say, about '27 or '28, this was, and then at the time of the depression in '32 –

Q. Excuse me. Let me interrupt you. This black teacher by the back door, was she teaching an all-black class?

A. An all-black class of fifth and sixth grade children.

Q. All right.

A. Then that was the only teacher for the black children in that buildinng up until the time during the depresson when married women teachers whose husbands could support them had to go home, and I was one of those that went home in '31 and '32. When I went back in '32 and '33 there was no place for me. We had had somewhat of a disturbance about these people being let out, and we were all assigned back to work. There was no place for me, because by that time another teacher had my class.

Q. Another black teacher?

A. Another black teacher had my class, and they had been told – the Board had been told – assign all those teachers.

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The Board of Education then said that I would – well, now, how do I say that – we had a court case out of it, and the mandate was, "Retire these teachers."

Wouldn't that be to the Board?

Q. Go right ahead.

A. Where was I before I was so rudely interrupted?

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So then we went back to work. That's always been a sore spot with me, my being let out that one year, interrupting my service, you know – so when I went back to work there had to be a place made for me, so to speak, so then 18 children who were slow, troublesome, worrisome, bothersome, generally disliked, were called from their groups and given to me in an ungraded class. There was no place to put me excepting in the brick building in a room that had formerly been the principal's office, a little cubbyhole upstairs, and this mixed black fifth and sixth grade and my black class upstairs were the only two black classes in the building.

Q. Let me just make it clear. When you say mixed, you mean mixed grades, not mixed pupils?

A. Yes, I do. No. No. No. No. No. These were all black children, and I had about 18 of these in this little room upstairs in the building. All the rest of the building was white excepting we two black teachers and these two classes of black children.

This continued until about, as I remember now I was in that room about two years, which would make it about '34 or '35. We had two little white children left in the building. Now these ten white teachers were maintained through all of this, and then as our classes became overflowing with black children, they were placed in the white teachers' rooms, but not until there was no place for the child to sit in the room.

Then when there were only two little white children left in the building, the white teachers were all reassigned. The black teachers were put in these rooms. We had at that point in time eight and ten – eight and two, that was ten – and six white teachers remaining in the building at this time now

teaching whites, a few whites, three and four in a classroom, and all the rest of their children were black.

Then, as soon as there were only two whites left, there were black teachers assigned to these rooms, and a black principal was assigned, and that was about '35, as I recall.

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[R. I. 635, Vol. 6] A. Then I resigned. Then I was out of the system six years, and then I went back and continued on until 1953. When I went back I went to Wogaman School and I stayed there twelve more years doing 40 years service in all in Dayton, and I never taught a black child in all – pardon me. I never taught a white child in all that time. I was always in black schools, black children, with black teachers.

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J. TESTIMONY OF MARTIN E. SLOAN.

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[R. I. 667-670, Vol. 7] A. Yes, sir. This is the 1971 annual report of the President as required by the 1968 Housing and Urban Development Act. At page 26 the President states, "Residential separation of minorities was and is another characteristic of the social environment which has been influenced by Federal Housing Policy. Until 1949 FHA officially sanctioned and perpetuated community patterns of residential separation based on race by refusing to insure mortgages in neighborhoods not racially homogeneous. The effects of this policy have persisted for many years after its reversal and are still evident in metropolitan areas today."

Q. Mr. Sloan, directing your attention to – coming back to the FHA multi-family program, the public housing program, does it require any certification before a project may be built or expanded from the local school agency?

A. Yes. It is among the requirements by the Federal Public Housing Authority –

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A. Among the conditions which are required by the Federal Public Housing Authority is an assurance that there are or will be school facilities adequate to accommodate the children who will be living in the public housing project, and this is a condition before approval is given. And one way that this assurance is given is through a letter or certification from the local educational agency.

Q. If such a certification is not made in some form or fashion can the project be built?

A. No, it cannot. Federal approval will be withheld.

Q. Mr. Sloan, let me give you a hypothetical – what may be a hypothetical situation. Assume a proposal is made to build a Federal Housing Project in a period of time when the agency did require segregation in the housing – that it true, it did require that, the Federal Public Housing Authority?

A. Yes. Many localities did require it.

Q. All right. Assume the proposal is to locate a public housing project with that given, that it will be segregated in an area that is on that map red, and therefore predominantly black, if the school authority refuses to provide school space in that area on any ground, it cannot be built, is that correct?

A. That is correct.

MR. GREER: I will object, your Honor. This isn't laid with any premise in the Dayton School System.

THE COURT: Objection overruled, Mr. Greer.

Q. Now, assume the School Board advised the housing agency that we will not build or add onto school space in this area because your policy is one of segregation and that will result in, because of the racial composition of the area, an all-black school; however, if you build it in an area where there are white children, white residents, then we will provide school space regardless of what your tenant selection policy may or may not be, could the project then be built only in the area where the school space could be provided?

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A. That would be right. So far as the Federal Public Housing Authority is concerned, so long as there are going to be adequate school facilities which will accommodate the children, that is the locationn they will approve.

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[R. I. 672, Vol. 7] Q. Now, I take it, Mr. Sloan, that from your limited understanding, the school authority cannot tell the housing authority what their tenant assignment policies should or should not be, is that correct?

A. As far as the Federal –

MR. GREER: I will keep my continuing objection to all this questioning.

THE COURT: I assumed that, Mr. Greer.

A. As far as the Federal Public Housing Authority's position is concerned, until 1962 the kind of tenant assignment policy adopted by local public housing authority was entirely up to the local public housing authority. Whether it wanted to adopt a segregated tenant assignment policy or an integrated tenant assignment policy was entirely a matter for local decision.

Q. As far as you know, the school authorities could not dictate the tenant selection?

A. As far as I know, the school authorities could not.

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[R. I. 674-763, Vol. 7] Q. Mr. Sloan, just to make it perfectly clear, may a Federally assisted, through the local housing agency, project be built if the school authorities decline to provide the school space?

A. No, they may not. Unless the Federal Public Housing Authority can receive assurance that there will be school facilities to accommodate the children who are living in the project, they cannot approve construction of that project. And if the school – local education agency does not give that assurance for whatever reason, then the project cannot be built.

Q. All right. Mr. Sloan, turning from public housing to

Federally assisted multi-family housing, do you know whether or not similar assurances are required under those programs?

A. Yes. Similar assurances are required with respect to FHA assisted multi-family housing, subsidized housing for low to moderate income families.

I believe, but I am not absolutely sure, that similar assurances also are required for non-subsidized FHA assisted multi-family housing.

Q. To your knowledge, is any formal certification required for single-family assisted housing?

A. I am not sure, Mr. Lucas.

Q. But the underwriting criteria indicate evaluation of that, is that correct?

A. Yes. The adequacy of schools always has been and still is an important consideration that goes into the decision to approve or not to approve FHA assisted housing.

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K. TESTIMONY OF HERBERT CARROLL.

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[R. I. 700, Vol. 7] A. Yes, it does.

Q. In terms of your curriculum?

A. It does.

Q. Do you know, or from your observation of the applications, is there a pattern of particular schools that white children are applying for curricular transfers from, and is there any pattern to the schools they seek to attend?

A. Yes. Basically in most Roth High School – let me be more specific. Particularly the white youngsters in Roth High School are seeking Meadowdale and Stivers Schools for latin and power mechanics. That seems to be the reason why they want to leave.

THE COURT: Excuse me. Which high school are they seeking to leave?

THE WITNESS: They are seeking to leave Roth High School, Your Honor.

Q. Roth, Meadowvale and Stivers; is that correct?

A. Yes.

Q. What about from Roosevelt; are there any transfers from Roosevelt?

A. Yes. Basically the transfers – you are talking about black students now?

Q. I am talking about white students.

A. There aren't any white students at Roosevelt.

[R. I. 713, Vol. 7] A. 716 high school youngsters.

Q. And in addition to those 716 students, there were 625 elementary students?

A. That's true.

Q. And if we look to the non-minority races over the periods that we are talking about, there were 23 students that transferred under the freedom of enrollment program in the elementary and middle schools; is that right?

A. That's true.

Q. And 89 in the high schools?

A. That's true.

Q. Now, some of these transfers would be from predominantly black schools to predominantly white schools, would they not?

A. That's true.

Q. And there are a few that are from predominantly white schools to predominantly black schools?

A. Correct, yes.

Q. The transfer depends on the choice of the student and the available space?

A. That's true.

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L. TESTIMONY OF DORIS BROWN.

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Q. Will you state your full name and your occupation, please?

A. I am Doris Brown, Principal at Miami Chapel School.

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M. TESTIMONY OF GRACE TOLES.

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Q. Would you state your name please?
A. Grace Toles.
Q. Where do you reside?
A. Dayton, Ohio.

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N. TESTIMONY OF LELIA I. FRANCIS.

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[R. I. 791-792, Vol. 7] Q. Are you familiar with the Garfield School area?

A. I am familiar with the Garfield School and the Willard School. Willard School is where by daughter went to school when I first came to Dayton, and it was a predominantly black school.

Q. Now, when you lived in the Garfield area –

A. I lived – not Garfield, Willard.

Q. Willard?

A. Yes.

Q. Did you know of any bussing of children out of there?

A. Definitely. I had occasion to talk to a woman who lived in an apartment above a store at the corner of Germantown and Summit. Willard was on the corner of Germantown and Summit. She wanted her child to go over there to school.

Q. Was she black or white?

A. She was a white woman. And they refused to let her child go just across the street, and a bus picked her up and carried it out from Summit and Germantown.

Q. You say Willard or Wogaman?

A. That is Willard.

Q. O. K.

A. Willard.

Q. Did you know of any other students, white students, who were bussed out of particular school areas?

A. The children from – when Wogaman changed, why those children were bussed out of the Wogaman district.

Q. When you say "those children" you mean the white children?

A. The white children were bussed out of the Wogaman School District.

Q. What was the effect of the urban renewal policy in terms of residents of blacks in East Dayton in the early years?

A. Well, the urban renewal program became known as the black removal program. They removed all of the black people from near the center city of Dayton, Ohio. You will not find one black person in that section now.

And the same thing happened in the east end. They moved all of the little pockets of black people who were out there. Why, they encouraged them and made it possible for them to buy property in the West Dayton area.

Q. This was true also of the public housing where they were building white projects in East Dayton, is that right?

A. Right.

Q. Did the relocation agencies actually relocate black people in West Dayton?

A. Absolutely. Absolutely.

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O. TESTIMONY OF DAVID GEORGE CARTER.

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[R. I. 797, Vol. 8] Q. During this period of time of transsition, do you have any idea where the white students attended school?

A. Yes. I guess, if we are talking about '57-58, after my freshman year, it is rather difficult to say, for some individuals that I went to elementary school with at Addison never arrived at Roosevelt, which leads me to believe one of two

things – and they still stayed in Dayton; they resided the same places, in Summit Courts, which is now called Lower Dayton View, if you are familiar with Dayton, right off of Negley.

Black students that lived in that area made it to Roosevelt. Okay. When you asked me what happened to the whites, they disappeared.

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[R. I. 811-813, Vol. 8] Q. Mr. Carter, are there any, and if so approximately how many, white children who take advantage of the freedom of enrollment to transfer to predominantly black schools?

A. I know of none.

Q. That does not mean there might not be a few?

A. What's a few when you are talking about 500 black kids going across town, and we are talking about one white or two whites.

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Q. Now, with respect to the curriculum transfers, are there instances where white children take advantage of that through transfers from a black school to a white school?

A. I gave you the example, the individual who left Jefferson and went to Meadowdale.

Q. Are there other such examples?

A. I can't cite specific examples. However, the way the policy is written up it is possible that – the policy as written states that curriculum changes do in fact have priority over racial changes.

Q. Now, are you aware of the capacity limitation on the freedom of enrollment policy?

A. I am, but I am also aware that there is a discrepancy in that. We have had three changes in freedom of enrollment. One we dealt with, first of all, what the principal said. If he said his building was full, it was full.

Secondly, we tried to deal with projected enrollment. The third area is actual enrollment within a building, the number

of youngsters that could actually attend a building without filling all of the classes.

Q. Now, are those actual enrollments that are projected the same as the rated building capacities?

A. Not necessarily. Not necessarily. As an example, you may have a projected enrollment for 700 in a building, you may have only 600 attend. The actual capacity may in fact be 1,000.

Q. In other words, in terms of the individual capacity to accommodate the children?

A. That's correct.

Q. And what would be required then would be the reassignment of some teachers in order to maintain some sort of class size?

A. Yes. This year what we have had to do is that we, because of freedom of enrollment, population shift, we have transferred teachers from one building to another, and, yet, we still have space, you know, and also we have turned back applicants.

Q. Black applicants?

A. Yes. I am aware of some because I work with them.

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[R. I. 850, Vol. 8] Q. Now, if we had a square here hypothetically and this were the Jefferson School zone, what you are describing in terms of overcrowding might be called spot or non-contiguous zoning. In other words, we take a quarter here and assign them to a school someplace else in the school district.

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Q. Mr. Carter, are you familiar with other school systems where often they use this type of zoning, spot or non-contiguous zoning for overcrowding and other purposes?

A. Some for racial discrimination.

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P. TESTIMONY OF KARL TAEUBER.

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[R. I. 924, Vol. 9] Q. All right. And then assume that the School System has – I am pointing generally to the map, but not necessarily to particular schools.

Assume along the area of change, 1970, Cornell Heights, Jefferson, in that range there, assume along that area of change that the School System for the first time assigns black teachers to the schools in the area of change which already have between 35 and 69 percent black students.

At the same time, there are a large number of schools with no black teachers in them, and almost only white children in them.

What effect, if any, in light of the past assignment practice, does the assignment of black teachers to those schools and not the others have in terms of identifying these areas?

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A. I think that this would be treated as information by anyone interested in what might happen to these schools that they are being defined as becoming black schools in the pattern where most schools are either entirely black or entirely white, so that it is a move in this hypothetical case toward defining the school as one which is becoming in the context of the racial views of the population more suited for black students than for white students.

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Q. TESTIMONY OF WAYNE M. CARLE.

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[R. I. 956-958, Vol. 9] Q. Your present employment is Superintendent of Schools in Dayton; is that correct?

A. Yes.

Q. Dr. Carle, what were your duties when you were Assistant State Superintendent?

A. I was in charge of the area of instruction which included five divisions, one of them for the chartering of schools, about 5,000 elementary and secondary schools involving annual inspections; the area of teacher certification involving the accreditation of 51 teacher preparation institutions and about 90,000 teacher certificates; the area of instructional materials; the division of special Education, that is, education for the handicapped; and the area of guidance and testing for the State of Ohio.

Q. You mentioned chartering schools. Will you tell me what you mean by that?

A. Yes. Until about the time I joined the Department, it had to do with issuing charters for new schools and then inspecting them for meeting state standards. At about that time, about 1966, as I remember, the legislature changed the term to chartering of school districts meaning presumably that all the schools within a district must meet standards and the report forms were developed for that purpose.

Q. All right. Was this one of your particular assignments?

A. Yes, that was one of the divisions over which I was responsible and in which I would engage if there were appeals or problems arising from them.

Q. Am I correct in analogizing chartering to accreditation?

A. Yes, the term accreditation often is applied to a voluntary association such as the North Central Association of colleges and secondary schools and chartering is a specific term used in Ohio to specify accreditation or certification by the State Department of Education. They are separate processes but they are related.

Q. All right. Did you have any particular responsibility with respect to chartering multi-county schools? Did that fall into that jurisdiction?

MR. HOLSCHUH: If your Honor please, I have not objected, but I assume that none of this testimony is being offered in connection with any issue involving the State Defendants.

THE COURT: I would assume this is by way of background, is it not, Mr. Lucas?

MR. LUCAS: Yes, and it will lead to the State Defendants in relationship to the Dayton School System.

MR. HOLSCHUH: Then, I do object, your Honor.

THE COURT: I am going to sustain Mr. Holschuh's objection. We are not going to determine at this time the relationship of the State Defendants to the Dayton School System.

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[R. I. 974, Vol. 9] A. I think you asked me something to the effect of whether racial segregation bore on the chartering of the school, something to that effect.

MR. LUCAS: Yes.

MR. HOLSCHUH: Your Honor, I believe my objection is in the record.

THE COURT: Overruled.

A. I recall the situation in 1966, approximately, when the Middletown Board of Education was completing a new high school, and it was time to request a charter for that school. There was some controversy in the community that the fact that the new school was located in, I believe, a white area of the City, and the old building was in a black area, or at least a mixed area of the community, and that if indeed a new high school were opened and the other left operating as a second high school, that one would be racially segregated quietly.

It was represented to my department that if an exception in standards could be made so that the schools could be chartered as to campuses of one building, that the objection to segregation could be overcome, and it is my recollection that we thereby gave a waiver and that the school then operated when it opened, approximately in '67, perhaps '68, as a ninth year, a vocational program on one campus, and ten through twelve on the other campus, so that all students went to both buildings.

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[R. I. 1004, Vol. 10] Q. How does this relate, Doctor, if at all, to previous practices of the Board of Education?

A. Well, as I reviewed the personnel files and the past observations in the district, there was virtually no transfer, that is, there was very little transfer of teachers, and up until the early 1950's, a policy of no assignment of black teachers to classes with white pupils.

Along about that time, I think I had referred to some statement I had seen of either administration or a Board indicating that that practice was to cease and that there would be gradual assignment of black teachers in communities or in school areas where the communities would accept them. That practice discontinued – well, it was in force when I came to the district, in that there still were schools in which there were no black teachers whatsoever, and the personnel department, as I discussed the necessity of moving in that direction, would insist that some communities had never had a black teacher or were not ready for a teacher or a teacher is not ready to go there.

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[R. I. 1102, Vol. 11] Q. Well, in 1933 I believe the minutes have an entry with respect to the opening of Dunbar, is that correct?

A. I think I have that.

This is June 5, 1933, and the entry says "Be it further resolved that the 7th and 8th grades at Garfield and Willard Schools be discontinued and that the attendance at the Dunbar School be optional for all junior high students for all 7th, 8th, 9th grade levels in the city."

That would be at the time the school was organized.

Q. And Dunbar is where the McFarlane School is presently located on the map, is that correct?

A. Yes, roughly in the same area as Roosevelt High School.

Q. Is there another minute entry in the forties, dealing with the Dunbar School?

A. In 1942, the entry is "Be it further resolved that the 7th grade pupils from the Willard and Garfield Schools be assigned to Dunbar High School."

MR. LUCAS: Thank you.

THE COURT: Dr. Carle, let me ask you a few questions: I was under the impression that Dunbar, from its inception, was an all black high school?

THE WITNESS: Yes, that is my understanding, Your Honor.

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[R. I. 1110-1114, Vol. 11] Q. Then, without regard to to what the position of your Board is, is your own philosophy as you will, opposed to the concept of the neighborhood schools or the forced bussing of students?

A. Neighborhood school is a term that I think defies definition. I have not heard it defined in this court and, therefore, I find it difficult to take a position one way or another on the term neighborhood school. I don't have a feeling about the term unless you define what you mean by that. The term forced bussing to me also has little meaning under the law. The Board of Education is required to provide transportation to students if they are in the elementary grades more than two miles away from school, and my experience has been that parents not only are eager to have that transportation but in some instances is very piqued in our district because we have proposed doing away with transportation that existed for distances less than that, and I therefore hardly look upon the transportation of pupils as being a "forced matter." I think usually it is quite the opposite. Persons want transportation for reasons of convenience and safety.

Q. Well, if I understand you correctly then you would regard these two concepts, the neighborhood school and the forced bussing of students as relatively meaningless concepts, that you can't really take a position for or against?

A. Well, I would find it very difficult to take a philosophical position, because I think both of them have been bandied around and have very little meaning or understanding in terms of any educational or administrative function of the school. I think they are just terms that are used but certainly don't relate to reality.

Q. All right. Now, you are, and back in December of 1971, were aware of the existence of Section 331348 of the Ohio Revised Code, which provides that the Board of Education of each city shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof, isn't that correct?

A. The question is was I aware of that statute, and the answer is yes.

Q. All right. Now, you have also told us on direct examination that you are aware of instances of specialized city-wide schools in the State of Ohio?

A. Yes.

Q. Are you aware of the Walnut Hills Academic High School in Cincinnati?

A. Yes.

Q. You were aware of an application from some people in the Toledo area for a city-wide school that was denied by the State?

A. Yes.

Q. Isn't that right?

A. Yes.

Q. You are of course, aware of the Patterson School, which is a city-wide school in Dayton, are you not?

A. Yes.

Q. That is a vocational high school where the students work two weeks and go to school for two weeks, is that not right?

A. Yes.

Q. You also indicated on your direct examination the instance of Dunbar, but that has been a school with neighborhood boundaries since 1962, has it not?

A. Again, it has boundaries. I don't know what the term neighborhood would refer to.

Q. Well, you referred to a two-mile radius a few moments ago. The accessibility of an area to the school is what determines its attendance zone, is it not?

A. No. I did not refer to a two-mile radius. I indicated that if a child resides more than two miles from a school, the law requires that he be transported to school. It has nothing to do with the radius or any limitation or guideline as far as distance is concerned.

Q. You would regard that two-mile radius for transportation as irrelevant to the questions of locations of places convenient to the attendance of the largest number of students?

A. I knew of no case in which in any standard of that kind has been applied in Ohio.

Q. All right. Without using the term "neighborhood" which you apparently don't recognize, Dunbar since 1962 has had a geographic attendance zone, has it not?

A. It is my understanding that that is so, yes.

Q. And the geographic attendance zone for Dunbar is in the geographical area where the physical building exists, is it not?

A. In the sense that the building is located within the boundaries described, for the attendance area, that is true. The boundaries, of course, are very irregular and very considerable in their distance from the building.

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[R. I. 1116, Vol. 11] Q. Just to clear up that one point: Is it your testimony that you don't understand what is meant by the concept "neighborhood school", Dr. Carle?

A. I would understand it in a context, and I simply am searching for the context in which you are describing it. • • •

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[R. I. 1123, Vol. 11] A. I wouldn't have thought there was any connection between freedom of enrollment on one hand and the term forced bussing on the other hand since there was no transportation as far as the Board of Education was concerned involved in freedom of enrollment. There was transportation available to students in the district. For example, sizable areas in the northwest and southeast areas and

students were given transportation. They were forced to attend those schools in the sense that those were the attendance regulations of the district, but that's why I say that term to me is so meaningless because wherever a student is assigned, if he is two miles or more from that destination in the case of the Dayton Schools a mile and a half, transportation is provided and generally welcomed.

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[R. I. 1191, Vol. 11] A. No. I think any of the citations that are honestly made reflect the typical white response to the black concerns of the time. Obviously, it is a very defensive paper and tends to cite rather limited measures none of which address the fundamental segregation of the schools district.

Q. And you also cited the fact that nine receiving schools would be more racially balanced with children from Edison and Jefferson where their elementary grown had necessitated transportation.

A. I thought that was a very positive development. Thus, I regretted the fact that we segregated back into the original schools two years later.

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[R. I. 1221-1222, Vol 12] Q. Well, without looking at the little map that's up in the right-hand corner, we have established that Mad River Township is an area to the east and northeast of the city limits of Dayton, haven't we?

A. Yes.

Q. And the high schools most accessible to that east side of the city are Kiser, Wilbur Wright and Stivers, are they not?

A. I don't see that that has any bearing, since they were already on board, and the distances probably were no greater than those being used to send black students to Dunbar at the time anyway.

Q. Well, let me rephrase my question. The three high schools to which these students were sent were geographically

located closer to Mad River Township than any other high schools in the System, weren't they?

A. I would say that that geographically is so. I think it needs to be understood that we are talking here about inner district transfer. These students were not residents of the city school district of Dayton, and were admitted to the district by Board action and contract, and therefore there is no relation to any existing boundaries within the Dayton School District.

THE COURT: Dr. Carle, would you have not taken them to the closest schools?

THE WITNESS: Well, I think the issue at the time, your Honor, was that there was not space for high school students at Mad River. When it became apparent, that is, the study that is in evidence, as I interpret it, became apparent that there would not be room at Wilbur Wright and Kiser and Stivers to continue serving those students. I'm simply saying that to my knowledge there was no consideration of housing them at Roosevelt or Roth — Roth was not in existence then. Well, perhaps it was, the later years — and Dunbar, and if space were available there, it would be just as appropriate to house the students in those schools as in the ones that were alleged to be without space.

THE COURT: And it would be your position that the Board's failure to do that is evidence of segregation?

THE WITNESS: Well, it certainly fits the pattern that has been pervasive down through the years, that no white students, regardless of from where they came, or the purpose, were assigned to black schools.

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[R. I. 1224-1225, Vol. 12] And just so I will understand your testimony are you characterizing this practice in the late '50's of putting Mad River Township students in the three schools geographically closest to that area as being somehow improper on the part of the Board of Education?

A. I say it is indicative of practice of not considering the assignment of white students to black schools.

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[R. I. 1355-1357, Vol. 13] Q. I show you Plaintiffs' Exhibit PX-5A. With reference to the assignment of both black and white teachers, new hires and transfers, could you give me what PX-5A shows with relationship to their racial assignment?

A. For 1968-'69 only?

Q. Yes.

A. It shows that Negro teachers assigned to schools with predominantly white enrollment numbered 40 and white teachers assigned to the same white schools numbered 223, and Negro teachers assigned to schools with predominantly Negro enrollment numbered 95, and white teachers assigned to schools with predominantly Negro enrollment numbered 64.

Q. Now, these are teachers; is that correct?

A. These are teachers.

Q. And is this the kind of study that later developed by which you became aware of the continuing extent of the factulty segregation?

A. Yes, it is obvious in terms of the new hires and transfers for that year the predominating pattern was the assignment of black teachers to black schools and white teachers to white schools.

Q. Now, you testified that you hired a certain number of black principals over that first summer you were here.

A. Yes.

Q. And then you assigned all principals in all schools for the fall; is that correct?

A. Yes.

Q. And did you for the first time assign a black teacher out of West Dayton?

A. A black administrator.

Q. Black administrator, I beg your pardon.

A. Yes, across the Miami River.

Q. And did that single assignment eradicate the pattern of identifying schools as black or white by the assignment of administrators?

A. By no means.

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Q. Now, with respect to PX42 about which reference has been made on cross-examination, could you tell me what PX42 is?

A. This is the assignment of non-teaching personnel by categories and schools and race.

Q. Now, you testified on cross-examination that there was a distribution on a racial basis in the school system.

A. Yes.

Q. Could you tell me what that distribution is?

A. In the high schools, for example, the assignment of non-teaching personnel alone would identify the school as white or black with respect to its pupil enrollment.

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[R. I. 2107-2111, Vol. 20] Q. Are you aware of instances or practices of the State Department of Education whereby accreditation or chartering of particular schools or school districts has been withheld or threatened to be withheld by the State Department of Education?

A. Yes. At the time that I joined the Department, the Legislature had just required that all districts of both elementary and high school – there were about 50 elementary districts – that were in the process of being notified of the necessity to join with another district in order to remain chartered. There was a reduction in the number of school districts for each of the years that I was in the school district by consolidation, and in some of those cases, this would be the result of inspection of schools unable to meet minimum state standards, and therefore required to be consolidated with another district.

Q. In general, Doctor, if a school district did not meet State educational criteria, or if a particular school did not

meet educational criteria, the State Board of Education had the power to revoke the charter, is that correct?

A. That's correct.

Q. Or to fail to grant a charter?

A. Yes.

Q. Would its failure to provide equal educational opportunity be greatly dissimilar of its failure to provide other educational opportunities in your opinion?

A. No. Indeed, in the opinion of the Attorney General, that was a definition of the law, that the State Board and the State of Ohio were required to report them.

Q. That was the 1956 Attorney General opinion that has been referred to already in this cause?

A. Yes.

Q. And the State Board for various educational reasons did so act, is that correct?

A. Yes.

Q. Now, with reference to any particular city-wide schools, did it act in that regard?

A. Indeed, in the creation – well, let me state just for city-wide schools and discuss a situation in Middletown, Ohio, where an exception was asked with respect to the construction of a new school and the proposed chartering of that school which would have resulted in two high schools in the city, one predominantly white and one predominantly black.

The request was that the schools be chartered as one institution on two campuses so that all students would go to both schools and therefore both institutions would be integrated, and such was approved.

Q. If they had been chartered separately, then they would have been segregated schools? They would have each had all the grades, is that correct?

A. That's correct.

Q. So the State Board did in effect adjust, which might be a word that could be used, its accreditation criteria in such a way as to set up a pairing of schools in effect, is that correct?

A. That's correct.

Q. With regard to the State Department of Education's advice to the Dayton Board that its present middle school plan was racially in violation of desegregation requirements, did the State Board take action under their authority to deny accreditation to those schools?

A. No.

Q. Could they have done so?

A. In my judgment, under the premise of the Attorney General's opinion referred to earlier, yes.

Q. And under the practices which they engaged in, you were setting up in effect a new school, were you not?

A. Yes.

Q. And you made Whittier, for example, a middle school? That was a new school that had to be chartered separately or differently?

A. With the exception that the law in 1966 provided as I think I testified earlier, to the fact that school districts are now chartered in toto, so that this was not a chartering matter, but it still is a matter of meeting minimum standards regardless. The whole district, in other words, is liable, not just a single building.

Or to put it another way, if a single building is not in compliance with the requirements of the State, then the whole district is in effect liable to lose its charter.

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[R. I. 2135-36, Vol. 20] [Following is proferred testimony of Wayne M. Carle] A. Metropolitan Dayton. I think it was 52,000 were going to school by bus and perhaps four to five thousand as far as the public school pupils are concerned were within the city and the rest would be outside the city.

Q. Now, a lot of those would be in rural areas or what, heavily urbanized areas?

A. All of the metropolitan area would certainly have to be regarded as urbanized. There are conditions within the Dayton School District that are identical to those that would exist in many of the suburban areas. For example, the City

of Kettering or the City of Oakwood, when we are driving down the street between Dayton and Oakwood, there is no difference other than the corporation sign or difference in the spacing of the housing of the schools. On the other hand, we have some areas within the school district that would be characteristic of some more suburban areas; that is, the area in the Meadowdale or Belmont area would have some characteristics like those of unincorporated or perhaps more peripheral areas of the metropolitan region.

Q. Now, you mentioned Meadowdale. How many pupils do you transport at Meadowdale?

A. At the high school level, something over 850 pupils are transported to Meadowdale High School. There is also transportation to some of the elementary schools in the same area. This would include, for example, Meadowdale Elementary where approximately 85 pupils are transported. There are other schools, you understand, in that cluster of schools in which there is also transportation. I just gave an example.

Q. Do you transport children to Lewton School?

A. Yes, Lewton is in the far east side of the district and something over 400 pupils are transported on what we call D-contracts. That is, parent transportation is provided.

Q. Many of those are Board owned buses?

A. Yes. To maximize the efficiency of the small number of Board owned buses, they are concentrated at one area of the city, largely in the east.

Q. Fairview High School, does it have some students transported to it?

A. Yes, Fairview has in the range of 300 pupils transported.

Q. Belmont?

A. Belmont has had a large number of pupils, something in the range of 680 or more.

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[End of proffered testimony of Wayne M. Carle]

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[R. I. 1374, Vol. 14] Q. Dr. Carle, are optional zones a sound administrative device for assigning pupils to schools?

A. I wouldn't characterize them as useful, no.

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R. TESTIMONY OF LLOYD LEWIS, SR.

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[R. I. 1383-1385, Vol. 14] Q. If you know how they were assigned, tell me the source of your knowledge.

A. If you were a student in Garfield or Willard, it was automatic. In my case, my children were in Wogaman. We could apply for other schools.

Q. You say you could apply for —

A. My children stayed in Wogaman. That was it, in that case.

Q. All right. When they came to high school age, do you know where their records were sent at that time?

A. Automatically they were sent to Dunbar.

Q. All right. And did your children attend Dunbar?

A. No. I applied for Roosevelt.

Q. And you say you applied. Did you ask that there be a transfer of your children to Roosevelt?

A. Yes.

Q. But your children's records were sent to Dunbar, is that correct?

A. I have no knowledge of where they were sent. I was aware of that fact, and I saw to it that they went to Roosevelt.

Q. So you asked for a transfer to Dunbar from Roosevelt?

A. To Roosevelt.

Q. In working with the students in the community, did you also work with teachers in the schools?

A. Yes.

Q. All right. Were you familiar with the general practice to the assignment from Dunbar from your work in the community?

A. Yes.

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Q. From your work in the community, did you have knowledge in general of how black children got to Dunbar?

A. Yes.

Q. And how was that?

A. Automatically they were sent if they were black.

See, that was the design of the school, the same as Christian Atticus in Indianapolis.

Q. Were you a member, sir, of an organization called Frontiers?

A. I was.

Q. Did you hold some positions within the organization?

A. I was Chairman at one time.

Q. All right. Are you familiar with any actions taken by the Frontiers, vis-a-vis the Dayton Board of Education with respect to integration of schools?

A. I was.

Q. And had that organization called upon the Dayton Board to take action in that regard?

A. I don't understand the question.

Q. Had the Frontiers asked, demanded or what-have-you, that the Dayton Board of Education take steps toward integration of the Schools?

A. Definitely.

Q. All right.

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[R. I. 1389-1390, Vol. 14] Q. And when were your own children in Wogaman Elementary School, Mr. Lewis?

A. It must have been in the year — they went to high school in '40, so you would have to go back about eight years.

Q. So it would be in the late '30's?

A. Early '30's.

Q. Early '30's?

A. Yes.

Q. And at that time was Wogaman essentially an all black elementary school?

A. No. Wogaman had integrated.

Q. Do you have any idea of what the composition of the student body of Wogaman was back at that time?

A. It was largely white at that time.

Q. All right. And you asked that your children go to Roosevelt High School, and that's where they went, isn't that correct?

A. In 1940, right.

Q. Now, I think you have indicated that you don't know where the records for your own children were sent after they completed their elementary education, isn't that correct?

A. That's correct.

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S. TESTIMONY OF GORDON FOSTER.

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[R. I. 1395, Vol. 14] Q. Dr. Foster, in connection with your teaching at Miami of Ohio, did you have occasion to work in any of the schools in the Dayton City School System?

A. Fairly extensively in this general area, the Metropolitan area. I supervised student teachers for three years, I think. I think during that time it was all – well, not all but many of the districts in this area, particularly Kettering and I can't remember whether I had any in the City of Dayton or not, but in this general area I got fairly familiar with schools. I taught extension classes for the University at Roth High School, I believe, for two years, and then at Wright State for a year when they opened that facility and transferred the extension classes over there.

Q. You say you taught at Roth. That was at night?

A. They had evening and afternoon classes both. I believe mine were in the late afternoon, and I have also taught extension classes in connection with some of the suburban schools. Trotwood, for example, is one I can think of, and

in connection with my duties at Miami University for a period of four or five years, I worked quite a bit with Dr. Purdy in the Bureau of Educational Field Services and did quite a bit of work in this general area in studying school district education.

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[R. I. 1402, Vol. 14] Q. Dr. Foster, you were the author or supervisor of the preparation of the plan of desegregation for the City of Dayton; is that correct?

A. That's correct.

Q. In connection with the separation of that plan, can you tell me how much time you spent in Dayton?

A. As I remember it, I had one person working with me on that, Mr. McDonald, now Dr. McDonald, and the two of us spent a total of something like 11 or 12 days in the city plus a good deal of time in Miami, but actually on site, I think it was 11 or 12 days, and I spent all but – well, I think all but four of those days. I spent seven or eight days on site at that time.

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[R. I. 1419-1420, Vol. 14] Q. All right. You listed optional attendance zones.

Is there any relationship between those two?

A. Yes, sir. Very similar. It is partly a semantic situation. But when you have an optional zone, in almost every case it has to be carved out of one of the two zones in which it is optional, one of the two attendance areas in which it is optional, and therefore it automatically becomes a sort of dual zone or, as you will, an overlapping zone.

Q. Dr. Foster, have you at our request studied the pattern of new construction in the Dayton School System?

A. Yes, I have. When you say new, what I have studied primarily is, from 1950 to the present.

Q. What has been your observations of the facts of the pattern of school construction, new school construction in Dayton, from 1950 to the present?

A. May I refer to my notes?

Q. Yes, please.

A. In making an analysis of new construction from 1950 to the present, I have before me Plaintiffs' Exhibit No. 4 and also the overlay PX-53A, which had to do with new construction and additions.

I made a slightly different analysis than the one presented in PX-4, in that I carried it through to figures for 1972-'73, whereas if I'm not mistaken PX-4 used attendance figures for last year, for the '71-'72 year.

What I found in new construction was, to summarize briefly, there were 24 schools opened from 1950 to the present. Out of the 24, 22 opened at 90 percent or more black or white. That is to say, only two of the 24 schools opened as facilities without being either 90 percent white or 90 percent black.

Of that 22, I found that seven schools opened 90 percent or more black and remained so today.

Most of them are at either the 99 percent or 100 percent black level.

Six of the schools opened at 90 percent or more white and remained so today, and of the 22, nine schools opened at 90 percent or more white, and today these nine schools range from something like 17.7 percent to 96.7 percent black.

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[R. I. 1422-1423, Vol. 14] Q. In response to the Court's inquiry, Dr. Foster, you did say it does have something to do with segregation?

A. That's correct.

Q. Does it have something to do with school segregation?

A. Yes, sir, in my opinion.

Q. Dr. Foster, in counting the schools for new construction, did you count, for example, the Jefferson Primary as a new school?

A. I believe I did, yes, sir.

Q. And the same would be true for the other primary units?

A. Yes, but I think there was one case that was sort of questionable and that was Allen Primary which in some document is listed as a primary unit and in some merely as an addition to Allen. In my data I counted it as an addition rather than as a separate unit.

I believe it has the same administration addition in the regular unit.

Q. All right. Can you identify for me the seven schools which opened 90 percent or more black and remain so today.

A. All right. Residence Park Primary opened in 1966 at 96.5 percent black, and in 1972 it was a hundred percent black.

McNary Park opened at 100 percent black in 1964 and is still a hundred percent black.

Jackson Primary opened in 1960 at 99.9 percent black and is currently 99.7 percent black.

The new Dunbar High School opened in 1963 at 92.7 percent black and is currently 100 percent black.

The Carlson Elementary School opened in 1958 at 95 percent black and is currently 99 percent black.

The Louise Troy facility opened in 1957 at 100 percent black and is 99.1 percent black in 1972.

Miami Chapel, which is adjacent to the Louise Troy facility, opened in 1953 at 100 percent black and is currently 99.8 percent black.

These percentage figures at opening, I took from Plaintiffs' Exhibit PX-4, for the most part, and in some cases, I believe, or I think in all cases, they are substantially correct. There may be a percentage point or so deviation.

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[R. I. 1425-1428, Vol. 14] THE COURT: Let me put the question to you another way. Do you build schools where the children are or do you build schools where you think the children should be? That is, do you build the school someplace else because it is a nonsegregated neighborhood and then

transport the children there, or do you build them where the children are?

THE WITNESS: Well, I think school systems have done both.

THE COURT: Yes. I understand. But I would like you to relate it to the Dayton situation.

The schools you have named are in an area that is predominantely black and has been, according to the census tracts, for quite some time.

I ask you again, would you build schools there or would you build them someplace else and move the children to the schools?

THE WITNESS: Well, in terms of desegregation I would consider very seriously not building them where the children are but considering other possibilities of site selection, because I think that in building them where the children are the Dayton System has managed to lock in and compact both the school population and the residential population in the inner city, and at the same time to promote housing segregation and school segregation in the far-flung suburbs.

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BY MR. LUCAS:

Q. Dr. Foster, would you identify the six schools which opened 90 percent or more white and remain so today?

A. All right. These would be Shoup Mill, which opened in 1958, 100 percent white, now 3.8 percent; Belmont High School —

Q. Excuse me. 3.8 percent black, is that correct?

A. I'm sorry. 3.8 percent black.

Belmont High School, which opened no percent black and is currently 5.2 percent.

MR. GREER: While we are giving those, I suppose we ought to have the dates. 1956?

A. (Continuing) I'm sorry. Belmont was 1956 and Shoup Mill was 1958.

Meadowdale Elementary in '57, which opened no percent black, and is currently no percent black; Horace Mann Elementary, opening in 1954 at no percent black and is currently 3.1 percent black; Orville Wright opening in '52 at no percent black and currently 8.1 percent black; and Eastmont opening in 1955 at no percent black and currently 0.7 percent black.

Was that six?

MR. LUCAS: I think so, Doctor.

THE COURT: Yes.

BY MR. LUCAS:

Q. Directing your attention to Meadowdale High School, is it just slightly over the ten percent figure you used?

A. My data give it at 10.6 percent black this year.

Q. And it opened at 0 percent?

A. That's correct.

Q. And Belle Haven?

A. Belle Haven opened in 1954 at 0 percent black and is currently 17.7 percent black.

Q. Dr. Foster, turning your attention now to the building additions. Did you examine those?

A. Yes, I did, sir.

Q. Will you give us the results of your examination?

A. All right. Again, in compiling these, I used Plaintiffs' Exhibit 4, and also the Ohio State, the recent Ohio State report, which did list the dates of all the buildings and additions as sort of a cross-reference.

THE COURT: Before you do that, Doctor, I would like to address another question, because I must confess I am truly confused with this line of testimony.

If there is something wrong with opening a school that is 90 percent black and something wrong with opening a school 90 percent white, then I assume the next step is that schools should be selected that are more equal. And so let's assume for a moment that these 13 schools were all located in sites where they are precisely 50 percent white and 50 percent

black, or in view of the city's population, 30 percent black and 70 percent white.

Every one of these schools was open at that point. Within five years, by reason of situations over which the Board had no control, they all were then 100 percent white or 100 percent black.

Would you describe that then as a segregative intent by the Board?

THE WITNESS: Well, I think intent is hard to prove in some cases, but I think it might be described as a mistake in judgment.

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[R. I. 1437, Vol. 14] Q. Thank you. Would you go now to the building additions and the inquiry which you made?

A. According to my figures, if they are correct in terms of building additions, in terms of 1950 to the present, there were 62 separate school additions made in the Dayton System.

Q. Now, Doctor, just a preliminary thing. If there were two separate additions made to the same school, is that included in your 62 figure?

A. That's correct. Some of these are multiple listings, some more than two. Some may be three or four.

Q. So, if they made an addition in 1954 and another one in 1960 and another one in 1968, you would have three individual notations although there might be only one school listed?

A. That's correct.

Q. And that's how you get your 62 total?

A. That's correct.

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[R. I. 1439-1442, Vol. 14] Q. Did you make a separate analysis of that or was the analysis made in conjunction with other studies in particular areas?

A. Well, both but I do have a separate analysis of this criterion. The criterion works in a sense in both directions. You can keep schools open to maintain segregation, and sometimes when you close schools, what you do with the pupils who have been assigned to the schools being closed is an important factor. In terms of keeping schools open to maintain segregation, I had access to the Touche-Ross and Company document made in 1972.

Q. Excuse me, Doctor.

A. I don't know whether that has been submitted as evidence or not.

Q. I believe it has. What is the Touche-Ross study?

I think it has been referred to several times. Can you tell me what it is?

A. I believe the title, at least, as I have it is the Business Operations Review Report.

THE COURT: Mr. Lucas, do you have an exhibit number on that?

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MR. LUCAS: It is Exhibit 56, Your Honor.

THE WITNESS: There is a feeling among many people, particularly school board members around the country, that schools are pretty inefficient and inefficiently run in their business operation, and it is quite a sound and reasonable technique these days to ask business people to come in and evaluate your operation and help you in terms of suggesting ways if money can be saved because finances in education are very important as always, and this is my understanding of the background of this study. The part I was particularly concerned about was the recommendation to the school system that they could phase out nine average schools and save something in the neighborhood of $700,000 to $900,000 annually by so doing. When I made the desegregation study in December of 1971, one of the recommendations in our report was also to close three elementary schools and one secondary school, and the reason we didn't recommend more was because we really didn't have time and that wasn't our major purpose. We didn't have time to analyze the buildings and so forth, but we were aware of a current situation where the projection for students in Dayton is one that is declining and the current

situation of over capacity being available at both the elementary and secondary level on a city-wide basis, and in this situation where you have as in almost all instances considerable number of very old school buildings, I think it is intelligent to look at the operating expenses and so forth and see if any of them can be closed out. I also had access to Plaintiffs' Exhibit 61 which is a report that Mr. Weinman made in April of 1972 to the Superintendent in regard to our recommendation in the desegregation study of closing Hawthorne and Fort McKinley and Washington Elementary Schools. Out of reading these and also my contact with Dayton in December of 1971, it is my opinion Dayton could very definitely close some obsolete schools which were, for the most part, segregated schools and reassign the students so as to promote desegregation. There was one instance which I feel is a good example. There may be others of the Dayton System closing schools and then reassigning students in such a way that promoted segregation rather than desegregation when they very definitely had options that could have done the other. This was in 1962 in the case of closing Garfield and Willard Elementary Schools. It is my understanding that the students from Garfield and Willard were reassigned most of them to MacFarlane which opened in the same year and which, I believe, was the old Dunbar High School which was at that time 100 percent black which at least in 1963, the following year, had 100 percent black faculty. Students were also assigned to Irving which was 96.6 black, and in 1963 had a 50 percent black faculty, and to Miami Chapel which was 99.6 percent black and in 1963 had a 93 percent black faculty.

Now, if you look at the map very briefly in terms of distances, if you look at MacFarlane and Irving and Miami Chapel which are in sort of the south central area of the city, it is possible that these children could have been assigned to Patterson or to Hawthorne. That's Patterson Elementary, of course, or to Longfellow which are about the same distances from the schools being closed and which in 1963, the year after, were white schools. Patterson was all white and Hawthorne was all white and Longfellow was 6 percent black or predominantly white.

All I am saying in this example is that here we have closing of schools in which students are reassigned and in their reassignments sent to situations in receiving schools where segregation is either increased or maintained when they could be sent to equal distance schools in which desegregation would be effected.

* * *

[R. I. 1448-1449, Vol. 14] Q. And what was that inquiry?

A. In terms of the use of site selections to maintain segregation, in the new construction sites from 1950 which we have already discussed to the present, many of these have helped to promote and to impact and lock in segregated or isolated situations either in the inner city or in the suburbs, and I think this is true in terms of both school segregation and housing segregation, that is, in terms of its effects. First of all, in the area of the white suburban expansions which are farthest from the center of the city which is all black, and these were, of course, more inaccessible at the time of construction than they are now. We have Valerie which was built in 1966 which is almost at the extreme north of the district. We have Meadowdale High School built in 1960 and Meadowdale Elementary built in 1957 to the north of the district. We have Shoup Mill built in 1958 and to the nearly extreme north. The south and east of the furthest white suburban expansion, we have Eastmont, on the extreme east built in 1965. We have Wilbur Wright to the northeast built in 1952, Horace Mann to the southeast built in 1954, and Belmont High School in the southeast built in 1956.

Now, contrary-wise, in the inner city during this time there were a couple of examples of schools which were built into locked-in situations in terms of segregation, and in fact these schools were surrounded by other schools which were all black. That would be McNary in 1964 and Jackson Primary in 1960.

Q. Dr. Foster, in your experience, use of the primary unit in close proximity to elementary schools, has this been a

matter reflective of segregation practices in your experience?

A. Yes. It is in a sense very much nothing more than an addition. They are on the same campus and for all practical purposes they are really one school.

Q. What effect does this have on the existing racial concentrations?

A. Well, it tends to secure it and to further insure that those schools are going to remain segregated and that the system as a whole is going to remain segregated.

Q. Do they tend to have the same boundaries as the existing elementary school?

A You are talking about the primary?

Q. Yes.

A Yes, they do.

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[R. I. 1453-1455, Vol. 14] Q. All right. How did you understand that the option worked between Residence Park and the Carlson area?

A. My understanding was that the students, and I don't know the exact date of the inception of this optional zone, but it is given on the data that was used to make this overlay.

The students have the alternative of going either into Jacksonn or into Residence Park.

We have studies exhibits for the Defendants, DXCP, which I believe gave the attendance at Jackson from 1957 to 1972 for the VA children, and that figure was zero. Defendants' Exhibit DX –

Q. Excuse me, Dr. Foster. What was the racial composition of Jackson?

A. Jackson in 1951 was 35.9 percent black.

Q. And in 1957?

A. In 1957 I don't have the figure. In 1963 Jackson was 98.5 percent black.

I believe Mr. Rivers testified, and I believe that he was at Jackson, that Jackson did have a few white students, and at Residence Park in 1957 it was basically white.

I'm not sure whether those are his exact words, but that's the substance of it.

Q. Jackson was a black school and Residence Park was a white school, and Defendants' Exhibit CP indicates no child from that optional area of the Veterans Administration Center in attendance at Jackson, is that correct?

A. That's correct.

Q. What about the attendance of children at the white Residence Park Elementary School? Did you examine Defendants' Exhibit CO?

A. I did, yes, and those figures were for the same years at Residence Park, and the attendance of VA children given in that resume from 1957 to 1972 was a total of 48 children, 8 of whom were black, five the race of whom were unknown, and 35 were white.

Most of these actually were in the late 1950's.

Q. What was the effect of that optional zone at that time, the Veterans Administration Hospital?

A. Well, it allowed the white students in that optional zone to attend white schools. I believe that was Residence Park.

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[R. I. 1455, Vol. 14] Q. Dr. Foster, I believe in earlier testimony you referred to the manipulation of zone lines.

Did you make any study of this type of practice in the Dayton School System?

A. Yes, I did.

Q. Perhaps since I believe in going into that we would get into optional attendance zones, would you first of all, and I'm backtracking, tell me what exhibits you used and what maps you examined and indicate some of the optional areas which you identified between schools of opposite race?

A. In the optional zone criterion, I examined the various overlays and base census maps. I believe in terms of exhibits the one that is currently on is the elementary '57 overlay, which would be PX-47A, and the ones following that in terms of dates at both the elementary and high school and middle

school level, and the different base maps, starting with the PX-46A, I believe, having to do with the ten-year census data.

I also examined other exhibits having to do with Board decisions in creating optional zones.

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[R. I. 1457-1458, Vol. 14] Q. You do have that data as to those other five, is that correct?

A. Yes.

Q. All right. Would you list them, giving us the name of the school and the racial composition?

A. All right. The first group that I established was created in 1953 by the Board.

One was Willard and Irving. This was in the Board minutes, Plaintiffs' Exhibit 123. Willard at that time was 100 percent black. Irving in 1951 was 46.6 percent black.

The second one was Jackson and Westwood established in 1953. Westwood was 0 percent black and Jackson, in 1951, was 35.9 percent black.

The third one was Whittier and Willard. Willard was a hundred percent black and Whittier, in 1951, was 29.9 percent black.

A fourth option was Whittier and Miami Chapel. Miami Chapel was 100 percent black in 1951. Whittier was 29.9 percent.

A fifth one was Wogaman and Highview. Wogaman was one of the all-black schools, and Highview, which was opened in 1951, I believe –

Q. Excuse me. Going back to Miami Chapel: Can you check that year with the year that it was opened?

A. Well, the '51 may apply to Whittier and not to Miami Chapel. It may have been opened a year or so later. I think it may have been opened in '53.

That's correct. Miami Chapel was opened in 1953 at 100 percent black.

Highview was opened in 1951 at 1.7 percent black.

The sixth in this group –

Q. Highview was with Wogaman, is that correct?

A. That's correct.

Q. And Wogaman was 100 percent black?

A. That's correct.

Q. All right. The sixth in the group was Edison and Jefferson optional zone, which was not listed in the Board minutes in PX-123, but it does appear on the elementary '57 map.

In 1951 Edison was 43 percent black and Jefferson was 0 percent black.

Q. Excuse me, Dr. Foster. Are you dividing these by years?

A. Well, sort of by the groups as I described them earlier. The three high schools, the six elementary schools that were developed in '53, and then the balance.

Q. All right. Fine.

A. The three high schools were Roosevelt and Colonel White.

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[R. I. 1461, Vol. 14] Q. In examining the other data and the depositions which you have listed, did you determine any of the other operative facts with respect to the way in which this optional attendance area worked?

A. Yes. We do have hard data in Plaintiffs' Exhibit 15-A, I believe it is, giving the number of optional area students attending Colonel White by years. In 1959 there were two blacks and 186 whites. In 1960, two blacks, 284 whites. In 1961, two blacks and 304 whites. In 1963, six blacks and 360 whites.

And our next date shows quite a change in the direction. In 1968 there were 216 blacks out of the option attending Colonel White, 191 whites. 1969, 245 blacks, 109 whites. In 1970, 298 blacks and 75 whites.

Q. What had happened to the total racial composition of Roosevelt at this time?

A. Roosevelt had become an all-black school and Colonel White partially so.

Do you want those figures?

Q. Do you have the figures for Colonel White, 1968-'69?

A. Not on this sheet, but I have it.

1968-'69, Colonel White was 19.3 percent black.

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[R. I. 1472-1473, Vol. 14] A. You mean from a general school administration standpoint?

Q. That is correct.

A. In my opinion, it is an important administrative device.

Q. Why is that?

A. Whether it is racially connected or not racially connected. Well, essentially I suppose like anything else in administration, what you are establishing is a rule, and then you start making exceptions to that rule and you make one exception for one group and another group wants an exception, and before long you are in an administrative nightmare. If I can cite one example quickly of this in Dade County which is the sixth largest system in the country, when we worked with them on their HEW compliance about three years ago, the present superintendent asked us to recommend immediately that all optional zones be erased and they had something like well over 150 of them which I believe the previous superintendent had established. I cite this as an example that there were some racial zones, but essentially it was this administrative's feeling that it would just be gotten rid of and it would be a much better situation for the School Administration generally.

Q. In what way do optional attendance areas affect desegregation and the stability of pupil assignment to particular schools?

A. Well, essentially in my opinion they create instability in the public in one way in terms of housing choices where there are choices and in terms of perception of whether a school is going black or staying white, this sort of thing, so that generally where you have an optional zone which has racial implications, you have an unstable situation that everybody realizes is

in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation.

Q. The optional attendance zones which you have identified in your testimony today, what is your opinion with respect to the effect or if there is any effect on racial composition of schools in Dayton?

A. Well, in my opinion, these accelerated and precipitated further segregation, and in those cases where I was able to cite hard figures, I think that is very definitely borne out, and I have no reason to believe that in all the other cases the same thing was true although I can't cite actual pupil figures from year to year because they simply aren't available.

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[R. I. 1479, Vol. 15] Q. Dr. Foster, with reference, first of all, to the option attendance zones, you described certain effects.

Are there short term as well as long term effects of the utilization of optional attendance zones?

A. Yes. In the ones we talked about at the high school level, if we can cite the Roosevelt-Colonel White optional zone, and the following Colonel White-Kiser optional zone, the short term effect it seems to me is to allow whites to move out of a school assignment that is becoming black, and I should point out that this is not to say that in many cases that at a certain point blacks also take advantage of this option.

In the Colonel White-Kiser situation, for example, as Colonel White has become blacker, we are at the point where there are no whites apparently opting now to go to Colonel White.

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[R. I. 1481-1483, Vol. 15] Q. Turning now, Dr. Foster, to the criterion manipulation of zone lines which you described, will you first of all tell me how you go about examining and what you would include within the definition of changing or manipulating zone lines? For example, would you include, say, new construction, for instance, as a zone line?

A. We would because generally unless there is a clear substitution of an existing school by a new school, new construction, for example, on the same site or virtually on the same site, you do have changing boundaries in the attendance zone when you set up new construction so that is very definitely a new factor. Essentially, the way you examine this is to take whatever data is available in terms of maps or descriptions of zone boundary lines and simply decide over a period of time how they have changed if at all and to what purpose they have been changed.

I did find, I think, in my examination of this in Dayton that attendance zone lines have remained relatively stable over the past 20 years and especially in comparison to many other systems that I have obesrved.

Q. All right. In light of the stability of the pattern – well, perhaps before we get to that because I will want to come back to that later – did you examine in particular the West Dayton area in light of this concept?

A. I did.

Q. And in examining the area and in terms of understanding what happened there, did you have to deal with some of the other criteria you have already discussed such as optional attendance and so forth?

A. Very definitely all the criteria because in almost every instance, the criteria worked together rather than working in isolation.

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THE COURT: Before you do, let me ask a question: Anytime a school system builds a new school, this by definition requires a change of attendance lines, does it not?

THE WITNESS: Not always. If you have, as I tried to explain and didn't do a very good job, if you have a building, a new building replacing an old building, sometimes they will maintain the old building while they are completing the new construction, and as soon as they get the new one finished,

then the kids simply move over into the new construction. The old building is either razed or used for other purposes.

THE COURT: Absent that, Doctor, assuming a situation where you build a new school that is not a replacement, as population shifts geographically you build a new school. That must include a change of a boundary line.

THE WITNESS: Correct.

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[R. I. 1485-1505, Vol. 15] Up on the small board is the census map of 1950, Plaintiffs' Exhibit 26B, and the elementary overlay of 1957, which is 47A, is that correct?

A. Yes, sir.

Q. All right, sir. Can you tell us what your analysis was in the Dayton area of the changes in boundaries?

A. Plaintiffs' Exhibit 75 points out that at this time, I believe in the winter of 1962, in December – no, 1952, in December, the Board went about making some decisions about redistricting and building and so forth in the west side schools. Some of these decisions had obviously already been made.

There were apparently two alternatives which were termed Plan A and Plan B, and the Board opted to go at this time with Plan B.

In describing this situation, I would like to not only talk about zone lines and changing zone lines, but also school additions and the other factors I have been discussing in concert with the zone line situation, and I think I can be very brief about doing this, but doing it in such a way that the interrelationship and the connection will be made, because it is very difficult to consider any one of these factors in isolation from the other factors.

It is very much more of a gestalt type of arrangement.

So in Plan B, the decision was made to decrease the Wogaman attendance areas.

Q. You are talking about the 1953 and this 1957 map is a result of Plan B, is that right?

A. Yes. This map shows Wogaman at this stage, and it was much larger, of course, in 1953, or '52, prior to the change.

Wogaman was decreased, and the Jackson zone, which is immediately to the north of Wogaman, was added to, and the Weaver zone, which is to the north and east of Wogaman was added to.

At the same time Willard, which was one of the schools in consideration, and I might say that Willard and Garfield and Wogaman at that time were all black schools, but Willard was kept the same; Garfield, which is just to the north of Willard in a fairly compact residential area, obviously because of its small size, was decreased and additions were made to Edison to the direct north of Garfield, and to Irving, which is to the southeast and can be seen on this map with quite a bit of green in this area.

Now, in discussing this move, the racial proposition of the schools which were added to according to the 1951 data, which was just two years prior to the move actually, Jackson, which took this part of Wogaman, was at 35.9 percent black in 1951, Edison was 43 percent black. For the schools that took part of Garfield — I beg your pardon.

I need to go back to where I ended with Jackson which took in part of Wogaman.

Weaver took in the other part of Wogaman. Weaver was at 67.6 percent black in 1951.

Q. Let me stop you at that point.

Wogaman was all black, so that any area taken in would have been black, is that correct?

A. That's correct.

Q. And the Jackson percentage was at that time what?

A. 35.9 percent black.

Q. And Weaver was sixty —

A. — 7.6.

Q. All right. So that was the 51 enrollment, is that correct?

A. That's correct.

Q. So they added from the black enrollment at Wogaman initially black students?

A. Yes. And the result obviously would be to increase the black percentages in those two schools, since the territory being transferred was all presumably black pupils.

The two schools that took from Garfield were Edison, which in 1951 was 43 percent black, and Irving was 46.6 percent black.

Garfield, of course, was also an all-black school.

Q. Would this have any effect, Doctor, of adding blacks to those other schools?

A. Presumably, since all the territory taken in was black residential area.

Q. All right. Doctor, in terms of the system as a whole, how did these schools to which black students were added compare with other schools in the system in terms of their black-white enrollment?

A. In looking at the 1951 data which we have, outside of the all-black schools we are concerned with, Wogaman, Willard and Garfield, the four schools of Jackson, Edison — Edison here, Weaver and Irving were the four highest percentage elementary black schools in the system.

Now, at the same time it is important to note that in 1953 we did discuss this in our openings, that Miami Chapel, which had been formed out of the Wogaman district or zone, opened as a 100 percent black school with pupils in 1953, which would be the same time these changes were made.

In terms of teaching staff which is one of the criteria involved in this analysis, according to the data in PX-3, Plaintiffs' Exhibit, by 1957 three or more black teachers had been assigned to Edison, to Jackson, to Weaver, to Miami Chapel, to Highview, to Whittier, and to Irving, and, of course, the three all-black schools of Garfield, Wogaman, Willard had all-black staffs.

Q. Miami Chapel, did it have more than three black teachers?

A. I believe Miami Chapel opened up in 1953 with some-think like, if my memory serves me, 85 percent black teachers.

I don't know how many were on the faculty. So that in

terms of teaching faculty, in terms of race, it is clear that the faculty assignment indicated that the schools involved in this total configuration were either all-black schools or going to be black, predominantly black schools.

Q. Now, Dr. Foster, were there any black teachers assigned to the other schools in the system at that time?

A. I believe that those are the only schools, the ones I read, which had as many as three black teachers at that time, which was 1957. I'm not even sure whether the data indicated whether there were any less than three teachers. But at that time that was a rather significant number of black teachers to to be assigned to any school.

Now, if you look at another criterion which we have been discussing, that of building additions, and in looking at this total area, the west side area, we note that in 1954 and 1958 there were additions made to Irving which had received part of the Garfield territory.

In 1954 and '58 there were additions made to Edison which received the other part of the Garfield territory, and in 1954 and 1955 there were additions made to Weaver, which received part of the Wogaman territory. Another factor that is involved in this total gestalt would be optional zones.

In discussing optional zones, we will remember that I mentioned six elementary schools which the Board in 1953 had created optional zones.

All of those are in this complex. According to Plaintiffs' Exhibit 123, which is Board minutes, an optional zone was created between Whittier and Miami Chapel directly to the west of Whittier designated by the cross-hatch, and apparently from the map a territory, the zone was taken out of the Miami Chapel area which was formerly, of course, Wogaman.

Q. Now, the area within the zone, does it coincide with the color coding on the map?

A. The area in the optional zone between Miami Chapel and Whittier corresponds completely – it is in the shape of a triangle in the southeast corner of Miami Chapel. It corresponds with the green census data which is 5 to 25 percent black in 1950.

Q. Does the western boundary, the optional area, take out all of that green area from the Miami Chapel zone?

A. It does coincide as I see the map, with the line separating the green part of Miami Chapel zone and the red part to the northwest.

Q. Miami Chapel is 100 percent black. What was Whittier at that time?

A. Well, not at that time but in 1951 Whittier was 29.9 percent black.

Q. And what color appears in the Whittier zone?

A. Whittier has a little orange to the northwest. It has quite a bit of green to the west and to the north and about two-thirds of it is white, but this might be a bit deceptive because it appears from the map that quite a bit of that is not populated.

Q. What was the effect of the optional zone at that time for Miami Chapel and Whittier?

A. The effect would be to allow the blacks – pardon me – the whites in the southeast corner of Miami Chapel to attend Whittier which was essentially a white school at that time.

The second optional zone created – I beg your pardon.

Q. I think you have answered the question. Go on to the next option.

A. It was between Willard which is here on the map and Whittier which we have just been discussing, Whittier to the southeast of Willard. Willard in 1951, as we know, was 100 percent black, and as we have just said, Whittier was 29.9 percent black, and again this optional zone allowed the whites in Willard to attend Whittier.

Q. And the color in the Willard area at that point was what, orange?

A. Almost completely orange on the census in 1950 which indicates 50 to 85 percent black.

Q. There is another optional area apparently just above that. Can you describe that?

A. The optional area just north and a little east of that is between Willard and Irving. We said Willard was a 100 percent black school in 1951. Irving was 46.6 percent black. This allowed the white students in the northeast section where the zone is at Willard to attend Irving School.

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Q. Dr. Foster, just to clear this up for Mr. Greer, I believe you started your testimony indicating there had been a change in policy simultaneous with the adoption of many of these optional areas; is that correct?

A. I don't know whether I did, but there was a change, I believe, in the year 1952 by the Board which said there would be no more transfers.

Q. Now, your testimony goes that the orange area indicates the presence from the census of some whites in that area, does it not?

A. That's my assumption, yes. I think the part that is confusing is that the data for school population while it may give 100 percent black doesn't mean as we know in many cases that the children living in the area are all black because under the previous transfer rules, those children may have transferred out.

Another optional zone created in 1953 was the Jackson-Westwood zone which is to the north of Jackson and to the south of Westwood.

In 1951, Jackson was 35.9 percent black. Westwood was all white.

Q. Now, you said that Jackson had black students from Wogaman added to it as a result of the action in 1953; is that correct?

A. That's correct.

Q. And this option was created, I believe you said, by the Board in the winter of 1952?

A. I believe in December, yes.

Q. Do you know whether or not it was implemented in December or the following September? Do you know that?

A. I am not absolutely certain, but I am reasonably certain it was begun in September of the following year.

Q. All right. What was the effect in terms of boundary changes, if any, of the creation of that option between Jackson and Westwood?

A. Well, essentially it had the effect of shrinking the northern boundary of the Jackson elementary zone because the students according to the census map residing in the optional zone would probably have been white students since the area is designated by white which according to the map is zero to five percent black in the census.

Q. Dr. Foster, as I understand the optional attendance area as it works, the southern boundary of the optional attendance area is now the mandatory boundary of Jackson and people below there are automatically assigned to Jackson; is that right?

A. Yes, because all of the optional zone would be part of the Jackson attendance area.

Q. North of that they could go either to Jackson or Westwood; is that correct?

A. Since that is part of the zone, I assume so, yes.

Another optional zone that was created in 1953 was Wogaman, between Wogaman and Highview, and it is not clear on this map and I am not certain, but I assume it might be a one-street zone since I believe the maps do not indicate one-street optional zones. In any event, the zone is to the south of Wogaman and to the north of Highview. It would be indicated by the fact that there is a very minute —

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THE WITNESS: — very minute space between the two colors of blue, blue on the side and red on the north.

BY MR. LUCAS:

Q. When was Highview opened?

A. Highview was opened, I believe, in 1951 as a 1.7 percent black school.

Q. Now, the boundary, the northern boundary of High-

view and the southern boundary of Wogaman, are they related with the exception of the one street optional area you have indicated to any color coding on the map?

A. Yes. The boundary goes along on the western part where, in fact, the housing is. It goes along and divides on the north. The all-black section of Wogaman is marked in red which is 85 to 100 percent black on the census map, and to the south of the line is the blue of Highview which is 25 to 50 percent black according to the census data.

There is one final optional zone created at that time which brings the total to six. I don't believe this was included in PX-123, the exhibit of the Board's minutes, but it is on this map of elementary 1957, and I would assume that it was created either in 1953 or shortly thereafter, and that is the optional zone between Edison and to the north and northwest Jefferson Elementary Schools. This would be the optional zone which is covering completely the green color on the base census map, green being 20 to 25 percent black.

In 1951, we know Edison was 100 percent — I beg your pardon — we know Edison was 43 percent black and Jefferson was all white. The results of this as in the other cases would permit these white students in the optional zone to option for Jefferson rather than to go to the blacker school at Edison. This would as in the situation to the west of Jackson and Westwood have the effect of shrinking the northern boundary of Edison in this case.

Q. Dr. Foster, did you locate any particular alternatives that could have been done with respect to the Wogaman School?

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A. I did note a couple of alternatives. As examples, to the south we did have Highview at that time which as we noted was opened in 1951 at 1.7 percent black. And, of course, the point I am making there is the territory from Wogaman could have been added to Highview since it was in certainly a walking distance and very little difference between the two

schools. Another possibility might have been to use Grace A. Greene as a receiving school from Garfield. Grace Greene is actually — maybe a little closer to the Garfield building. It is about the same distance as Edison, and they are all within walking distance of each of the three schools. Grace Greene in 1951, I believe, was 6.5 percent black. This is merely illustrative of the fact that by making another choice the Board could have moved the black students to a much wider option at the time than they chose to do.

Q. Dr. Foster, just looking at the area as you have done in terms of the construction additions and new school construction of Miami Chapel and redrawing of attendance boundaries and creation of optional zones, what was the effect of the implementation of Plan B in West Dayton?

A. Well, I think the effect was clearly one of locking in and freezing this configuration including these schools into an all-black school situation.

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A. I did list three cases where schools were opened involving changing zones and one we have discussed in 1951, the Highview School, was opened just to the south of Wogaman with Wogaman 100 percent black and Highview opening at 1.7 percent black, and I believe that previously I stated that this zone line might have been changed to move more black students into Highview.

THE COURT: Excuse me.

Dr. Foster, I am concerned about the horns of the dilemma that a school board now finds itself on, because a previous witness testified that when you start moving black students into a white school, you merely accelerate the turning of that school into white.

Now, you have just suggested that an alternative would have been to move them into the Highview School. No matter what the school board would have done, is it not true that it would have had the effect of accelerating the movement of blacks into a school?

THE WITNESS: Well, let me say that I agree with some of what you are saying. The problem, as I see it in this type of situation, is essentially one of diddling around piecemeal with desegregation instead of attacking the problem wholesale and making clear that you are desegregating the entire system.

THE COURT: Would that involve transportation then?

THE WITNESS: In a situation today it certainly would, yes.

THE COURT: Is it fair to say, Dr. Foster, that from your analysis and your testimony that the only viable alternative to this would be a system of transportation of children, that anything else is mere a makeshift? I don't want to put the words in your mouth.

THE WITNESS: Right.

THE COURT: But I'm getting the feeling that there is only really one alternative in your opinion.

THE WITNESS: No. I think there is a second alternative. I guess that is redundant. There is an alternative. Rather than do it the way in which the Dayton Board did in addressing itself to this very real problem in west side, of a changing community, which certainly has housing overtones and all the rest, if the Board does take a stance as I suggested they could have in a couple of situations in this change, where there were white schools directly adjacent, the message clearly is to the community that the Board is doing everything it can, even though over the long run the results may wind up segregated, but at least it is doing everything in its power to maintain a desegregated situation.

I think the result of this is to produce more stability in real estate movements, in the general public's attitudes of, well, the whole area is going black, so you know, that's the way it is.

THE COURT: Doctor, there has been testimony here of a tipping point that has been used.

Do I understand that what you are now suggesting is that as long as the Board doesn't exceed the tipping point, it would

be satisfactory to adjust zone lines as an alternative to transportation?

THE WITNESS: Well, I'm not sure what your question is.

THE COURT: All right. It's possible that I'm using a term that I assumed was a general one in this field.

THE WITNESS: Well, it is. I don't agree with the concept because as far as I know there is only one piece of research that I have seen on this. There may be others. But Johns Hopkins did a research of tipping point some years ago in relation to desegregation on the assumption that there was a point at which there was a big movement of blacks, and the results of the research indicated this wasn't so; that if a certain area of a city is going to go black, then it simply goes black over a period of time.

THE COURT: Irrespective of the school board does?

THE WITNESS: No. It is simply a question of the school board contributing to the pattern and accelerating it and exacerbating the whole movement.

THE COURT: Well, any change such as you are now discussing that would have the effect of making a white school of a larger percentage of blacks becomes then a matter of degree, because witnesses have testified that there is a community perception and that after a student body passes a certain point it is perceived as a black school.

Now, if that is true, then the school board is faced with the problems of so adjusting the percentages as not to send black students to a white school, so as to make that perceived as a black school.

THE WITNESS: Well, to start with, I do think this is a controversial issue, and it is not the tipping point arrangement as a very popular concept with school people. I think they all would like to believe and do believe honestly in their own minds that a school – not only the community moves at a certain tipping point, but that the school itself is inferior once it gets a certain percentage minority group members, which I think is ridiculous.

But be that as it may, I recognize that a board in making decisions in these cases may be fighting a losing battle, and as I stated, I think the only secure solution and the only safe solution is to disestablish a dual structure in the entire system so that whites in fleeing or changing however you want to term it, meet the same situation wherever they go.

THE COURT: In other words, Doctor, do I understand you to say that the only real alternative, other than a constant adjusting and watching of percentages and so fourth, is transportation?

THE WITNESS: I think that would be involved in the final analysis, yes.

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[R. I. 1515-1516, Vol. 15] Q. Dr. Foster, we go now to your third example. If we can at this point, let's discuss the Roth and Roosevelt situation.

A. I believe we covered Highview and Gardendale. The Roth High School opened in 1959 which we can see on the large map to the west of the city.

Q. Do you want to step to the smaller map here, Dr. Foster. We have put up some new overlays. We still have 46C, the 1960 census, and 48D, the 1960 high school attendance boundaries.

A. That's correct. On this map Roth is located almost at the extreme west central portion of the Dayton System, and the boundaries are designated as I am pointing to the immediate east of the established 1959 opening zone for the Roth High School, we have Roosevelt High School adjoining Roth on the east. In terms of setting up these zones, the indications are that the Roth opening essentially took the whites, white students out of Roosevelt. The base census map indicates that the largest portion of Roth is in blue, almost all to the south and southeast and to the north is blue representing 25 to 50 percent black. All the other portion surrounding the school site itself is white indicating zero to 5 percent black, and on the 1960 census data, there is a small

section to the east of the zone and to the southeast of the building which is in orange representing 50 to 75 percent black whereas at that time Roosevelt in 1959 or in the 1960 census was almost entirely red indicating 85 to 100 percent black. We know from Plaintiffs' Exhibit 1 on admissions that Roth opened with 662 pupils and that the same year Roosevelt decreased by 602 pupils from the previous year. We know that in 1963 our data indicates that Roth was 53.5 percent black whereas Roosevelt was still close to all black being 94.5 percent black. We also know or assume from Mr. Kirk's deposition that there were some considerations given by the Board to race in the establishment of the Roth zone and in the erection of the building itself.

Q. Dr. Foster, if you will follow with me my pencil, the boundary of the original Roosevelt High School zone included this optional area between Colonel White and Roosevelt and went all the way to the now boundary of the northern boundary of the Roth School; is that correct?

A. Yes.

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[R. I. 1518-1520, Vol. 15] Q. We have now placed up high school attendance boundaries 1965, Plaintiffs' Exhibit 49B. Dr. Foster, looking first of all at the large map since it may be more readily visible, what is the location of the old Dunbar School as it was established with the relationship to the Roosevelt School?

A. I believe it would be fairly close to the Roosevelt School and to the east.

Q. That is the present MacFarlane School building?

A. Yes, slightly to the south but mostly to the east.

Q. All right. What is your understanding about the operation of the old Dunbar High School?

A. My understanding is that it does have to do with attendance zones. It was a city-wide zone and it was all black in its student assignment and all black in its faculty assignment except for maybe one or two persons in a special teaching

field, and I think it was driver training, and the old Dunbar High School, as I say, drew from the entire city extensively. It was an open enrollment school. I do believe that at one point there were certain grades assigned to it from one of the elementary schools close by. It was either Weaver or Willard. I believe in 1942 Willard and Garfield 7th grades were actually assigned to Dunbar rather than given a choice of attending it. Theoretically, at least, anybody could opt to attend or choose to attend the old Dunbar High School but in practicalities, only blacks chose to do so. I think it had a strong effect on the development of Roosevelt since it was very close to Roosevelt and the testimony in other evidence suggested there was some interplay between the two schools in terms of blacks going to one or the other as Roosevelt became increasingly black in 1947 and was 15.3 percent black. In 1951, it was 31.5 percent black and in 1963, the year after Dunbar became MacFarlane, Roosevelt was 94.5 percent black.

Q. Dr. Foster, the earlier demographic map is now covered up, but there were white people south and to the west of the Roosevelt zone who walked past or walked longer distances to Roosevelt than they would have had to walk to Dunbar; is that correct?

A. Well, this is correct. They could have opted to go to Dunbar, but as I stated, I believe no whites did so.

Q. Well, when Dunbar was opened, was there any action taken identifying that school as a black school or white school aside from those you have already mentioned?

A. You mean other than making it a city-wide school and assigning black faculty?

Q. Well, I didn't realize you mentioned black faculty.

A. Yes, I had. I know of no other official action.

Q. What is the effect, and if you can reference it to your experience, of establishment of such a school in proximity to Roosevelt with the all black faculty?

A. Well, it was clear that the old Dunbar was an all black school. This allowed blacks to opt out of Roosevelt and go to MacFarlane — I mean to Dunbar, and essentially in

my opinion accentuated at that time the whiteness of Roosevelt and the blackness of Dunbar.

Q. Do you know the date the old Dunbar School was built?

A. I have it, yes. If I am not mistaken, it would have been 1931. This was as of the date of original construction for MacFarlane.

Q. Assuming it opened during the thirties, are you aware, Dr. Foster, that it was the policy of the Dayton Board of Education to refuse to permit black teachers to teach white children in the system at that time?

A. Yes, I am aware of that.

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[R. I. 1522-1526, Vol. 15] Q. Dr. Foster, the record reflects that it was the policy of the Dayton Board of Education to refuse to permit white children to be taught by black teachers. What effect in terms of possible white attendance at Dunbar, does the combination of that policy, with the assignment of an all-black faculty which you have already testified to, to that school when it opened, have?

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A. I think potentially it is obvious, as I said before, that a white child could opt or choose to go to Dunbar, but for all practical purposes, white children didn't do this, and the fact that black faculty were assigned in toto to Dunbar would certainly indicate, I don't know whether legally or not, in terms of Board regulations, that white children couldn't go there, but on the face of it they wouldn't.

THE COURT: Dr. Foster, in your research and preparation for your appearance, have you found anywhere any evidence that white children were refused admission to Dunbar?

THE WITNESS: I don't believe so. I can refer to one thing from an exhibit.

THE COURT: If you would, please.

THE WITNESS: I believe it is Plaintiff's Exhibit 28, which is a memo by Superintendent French. I think this essentially answers your question. He says, "Dunbar has no boundary. Theoretically any child can elect Dunbar, but practically only Negro children attend."

THE COURT: You may proceed,

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Q. Dr. Foster, referring now to the criterion which you discussed, transfer of policy: Did you examine transfer policies in the Dayton School System?

A. Yes, I did.

Q. Now, you have already testified, I believe, with respect to the statement in the minutes, as to the elimination or reduction of transfers at the time of the option of the optional attendance zones.

What did your examination of these policies indicate from that point?

A. There were some records in the testimony which I won't discuss involving this. There was one exhibit which is PX-16, which it states that in 1969 whites were given emergency transfers from Roosevelt to Stivers, and further than that, my examination led only to review of the transfer policy, or the freedom of enrollment policy, which was adopted in 1969, and as I understand it, has been continued through the present contained in Plaintiffs' Exhibit 16, which sets up a priority for transfers, and further examination of Plaintiffs' 16-D and 16-F gives some hard figures about the results of this policy since its inception.

Q. And what effect has this policy had on segregation that exists in the Dayton School System?

A. From my understanding of the data, I would say that the hardship and emergency clause in the transfer policy is pretty racially mutual. That is to say, that in 1972, according to Plaintiffs' Exhibit 16-F, 260 blacks —

THE COURT: Doctor, may I ask that you not quote

from the exhibit. If you have referred to it, I assure you I will check it.

I'm intentionally interested in your conclusions. I'm not interested in the figures. They are available.

THE WITNESS: All right. My conclusions are that the hardship policy led to primarily whites moving to white schools and blacks to black schools.

My conclusion concerning Exhibit 16-D, which had to do with Dayton for the four years of the total transfers, indicate that in no cases, for all practical purposes, did whites transfer to white schools, and there was some movement of blacks to white schools.

BY MR. LUCAS:

Q. In terms of its effectiveness in eliminating patterns of segregation, do you have an opinion as to the effectiveness of the present policy?

A. I would classify it as minimal.

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[R. I. 1533-1540, Vol. 15] Q. Now, Dr. Foster, assume, if you will, though there is some difference in the testimony, that the policy of the Dayton Board of Education with respect to faculties, which I believe was one of your criteria, has been at least until 1951 of never assigning a black teacher to teach a white child, and then the pattern which you yourself noted through 1957 of the assignment of some black teachers to schools with large numbers of black children, and then the continuation of a pattern of relationship between a number of percent of black pupils and a number of percent of black teachers in schools until the current school year.

Do you have those facts at this point?

A. I think.

Q. All right. And then assume that there is a substantial reassignment of a faculty in the system. Again, there is some disagreement at this point as to whether or not there is still

a relationship to density of black pupil population and the numbers of percent of black faculty.

But assuming that has been, let's call it, for the sake of this hypothetical, a perfect racial balance of faculty.

In light of that history, could you give us your opinion as to the effect, first of all, of that policy before the change, in terms of identification of schools as black or white and the effects of that change on the present situation in the Dayton School System?

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A. Well, my opinion is that this policy and practice before the change we assume took place, especially since it is in a northern district, would indicate that the Board is missing or has missed a golden opportunity to prove that it does want to run a unitary system and remove segregation practices insofar as it is able, because the Board clearly, as I understand it, under most State laws, or all State laws, can assign teachers willy-nilly in the System wherever they want to. This is not a free choice matter.

Q. Is it also an annual option that the School Board has?

A. Yes, in terms of assignment. In terms of my opinion on what this does, as recently changed, assuming this, I would have to say that this does not remove by any means the vestages of a segregated system since it is only one component of several important aspects of a system segregated or desegregated. I think it is a very important component, and I think it is a step certainly in the direction of desegregation, and a very positive step.

But coupled with the other most important step of pupil assignment, so long as the schools themselves remain segregated, as they certainly do at this time in my opinion in Dayton, then the fact that teachers or staff being desegregated, if we assume that doesn't carry near the weight it would if the total desegregation process had taken place.

Now, if I can go a step further in my own opinion on that briefly: If in fact all these components were taken care of

and we had a truly desegregated system, I would hazard that even then it is going to take a year or two for the identification of schools as black or white to be removed, but we haven't been doing that long enough to really know how long it does take. But I think that in some systems that have done this completely two or three or four years ago, they are very definitely and quickly no longer thinking of schools as black or white but as just schools.

Q. Dr. Foster, did you observe when examining the construction pattern and the additions to schools a pattern of assignment in that regard of faculty?

A. Yes.

Q. What was that pattern?

A. The pattern was largely one of assigning faculty by race according to the race of the school.

THE COURT: Mr. Lucas, could we now drop that issue? I think we have abundant testimony the School Board did assign black teachers to black schools and white teachers to white schools. Let me say I am aware of that. May I ask that we now abandon that for evidentiary purposes.

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Q. Dr. Foster, you used the term pattern. Is an important element the assignment of a particular percentage of black or white faculty to a particular school or is it something that can be considered in the context of a single school?

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A. I think I have already stated that these things have to be considered in the total configuration, and that assignment of teachers to any one school in the system is no indication of the pattern.

BY MR. LUCAS:

Q. Dr. Foster, I think we have covered your criteria.

A. As a matter of fact, we have not.

Q. I was looking for my list of criteria.

THE COURT: I do trust, Dr. Foster, that these are now different criteria that we have not covered.

THE WITNESS: Yes, and I think there is one left.

THE COURT: I would be most interested in hearing from the witness.

THE WITNESS: And some of these really fit in more than one example. They are overlapping so that it is simply a matter of judgment as to assigning them to one classification, but in the problem of great organization, I chose to put the establishment of the middle schools in 1971, and simply point out that these five middle schools which were established marked again a fine opportunity for the school system to illustrate that they were all for desegregated systems because one of the —

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THE WITNESS: All right. My conclusion is that the establishment of the middle schools in 1971 resulted in the establishment of four out of five schools that were clearly racially identifiable, therefore, increasing or maintaining segregation as opposed to availing the opportunity of decreasing it.

Q. Which were the four of five that you considered racially identifiable?

A. Cornell Heights, MacFarlane, Whittier, and Orville Wright.

Q. Now, Dr. Foster, in your review of these criteria and as you have testified, they are inter-related and somewhat interdependent. Do you have some general conclusions from your examination of these criteria?

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A. Well, in the interest of brevity, I think I could summarize each one of them with a sentence or two, but I will forego that arrangement and simply say that taken individually or in isolation, any of these criteria or different components of any of these criteria might suggest otherwise, but basically I think the examples and illustrations I have given and not

summarized illustrate that the results of the Board in the last 20 years, mainly the period in which we have been reviewing in Dayton, the results have been to either increase segregation or maintain it when taking all of these things in a total pattern or configuration. In some cases, I think it was very clearly indicated, and I hesitate to use the word purposeful, but I think a better word that would describe my feeling about Board action in these matters is predictable, and I realize in saying that that hindsight is always better than foresight and much easier, but I think from going over the data and analyzing it, it is pretty clear in many cases the Board was aware of what was likely to happen, and I think the results as I have attempted to analyze them and display them have indicated what did happen.

Q. Dr. Foster, without going into any great detail, the pattern of school construction, wasn't particularly one which you took into account in coming to your general conclusion?

A. Very definitely, particularly the decisions involved in the west side arrangements in 1953 and the building additions.

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[R. I. 1548, Vol. 16] A. Yes, I found in checking against this there were in building additions — I had stated there were 62 school additions to the present. Actually, there were 33 for a total of 95 additions since 1950. Eighteen of these 33 additional ones were made to schools which at that time were 90 percent or more black or white. This means out of the total of 95 additions, there were 78 additions made to schools 90 percent or more black or white. Seven of these additional 33 building additions were not made to this type of school.

Q. That's seven more than the 18 of 33?

A. That's correct, making a grand total of 9 which were not made to schools 90 percent or more black or white when they were added, and then 8 of these 33 additional I found I couldn't decide what their racial composition was at opening because of incomplete data. So, I classified those as uncertain. Those included additions to Drexel in '54 and '56 and additions

to Greene in '57 and additions to Highview in '54, two additions to Irving, one in '54 and one in '58, and an addition to Jackson Elementary in '53, and an addition to Westwood in '60, and I think there has been a good deal of testimony and some exhibits about those schools as changing schools.

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[R. I. 1590-1591, Vol. 16] Q. The one thing that the maps clearly show us in the Dayton situation is that there has been very little change in the attendance zones over the past 20 years, isn't that right?

A. I believe I agreed with that, yes, sir.

Q. All of the school attendance boundary lines have remained relatively stable for the past 20 years?

A. That's correct.

Q. And I think you have also indicated that that is especially true when you compare the Dayton situation to many other systems, such as Detroit, where you have made observations?

A. I think I made that reference, yes.

Q. And that is true, isn't it?

A. I would say so as a generalization, yes, sir.

Q. Another thing that just a glance at the map makes very clear in this case is that the optional attendance zones are all located approximately equidistant from the two schools that are affected by them, isn't that right?

A. You are saying equidistant from the site population of each of the options that can be selected to the total optional zone?

Q. That's right. In other words, they are in the middle area between the two schools that are involved?

A. Well, they have to be in the middle area between the two schools, but that is one thing; to say that and something else, that they are equidistant from the two sites.

Q. Now, I'm lost.

A. Well, I understand your original question to say do I agree that the optional zones in Dayton are equidistant to the

schools which they serve, and by that I understood you to mean the school building sites and not the total attendance areas. If you are talking about the attendance areas, I would agree, yes, sir.

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[R. I. 1627-1630, Vol. 16] Q. Then, let's go to the optional zones where you spent a good deal of time on your testimony last Wednesday. You would agree with me, would you not, that even if you don't approve of optional zones as good administrative practice that they are an extremely widespread administrative device in school systems and that they often exist for the most innocent and legitimate of reasons?

A. Well, no, I don't think I would agree with that completely. I think they are becoming much less widespread than they were because in many cases they were used for segregation reasons. I think they are used for legitimate reasons, but I I think again administratively except on a very temporary basis they are bad news.

Q. All right, but let's go back to the fifties and sixties. They were very widespread, then, were they not?

A. In Dayton are you saying?

Q. No, throughout the country.

A. Most of the systems I have examined at that time — not most, but quite a few of them had them, yes, the big city systems especially.

Q. And a good many of them grew up with the idea that if there is no great administrative problem created, there is no reason not to let people go to one of two schools if it is equally close to go to either school; isn't that right?

A. That's a little complicated.

Q. Let me try to break it down. I live on Block A and I have got a school that is three blocks one way from me and another school that is three blocks the other way from me. So, as far as I am concerned, it is just as easy to go to one school as the other, and the reason optional zones grew up in educational systems at least in part is from the feeling that if it

creates no great administrative problem to the school system, why not let Greer go to School A or School B.

A. I wouldn't agree with that.

Q. You wouldn't? In understanding optional zones, you would agree, would you not, that you have to consider many of the same safety and access factors that are involved in setting fixed attendance zones?

A. Well, I won't argue with Dayton's rationale for creating optional zones, but I think I stated this is the first case I know of access being used as a basis for the creation of optional zones. That's a new one on me, and I don't really see that there is, you know, a need to create an optional zone in this case. Why not assign the children one way or another and draw your line and then change the boundaries later when the proposed changes in the area come off. I think that would remove the possibility of your being questioned or being suspect in the creation of an optional zone especially if it has racial possibilities.

Q. Nobody was questioning optional zones back in the fifties when these were set up, were they, Dr. Foster?

A. Well, I don't know as a matter of fact.

Q. And the optional zones that appear in the Dayton School System are scattered to the east and to the north as well as in the west side of Dayton, aren't they?

A. I believe they are all over the system, yes.

Q. Now, in an optional area the option runs to all students who are living in that area regardless of their race, doesn't it?

A. It is supposed to, yes.

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[R. I. 1635-1636, Vol. 16] Q. Now, you have identified and discussed three high school optional areas. The first one that you mentioned was a small area that was created between Roth and Fairview in 1965; isn't that right?

A. That's what I have on my notes, yes, sir.

Q. And according to all the information that is available,

there were no students that went to any schools in that optional area between 1965 and 1971; isn't that so?

A. Well, I think I testified that I understood it was a very small number and something less than five students, I don't have the date for that.

Q. If I could refer you to Defendants' Exhibit CL.

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Q. Am I not correct that according to this information there have been a total of three students attending either of these schools from this optional area and that all three of those students have been in the last two years?

A. That is correct, I believe.

Q. And that there were no students attending either high school from the optional area between 1965 and 1971?

A. According to the exhibit, that is correct, yes.

Q. Now, let's then move to the Colonel White-Kiser optional area. I think you told us on direct examination that in the four school years from 1967 through 1971, 102 white students from that area went to Kiser and 27 white students from that area went to Colonel White.

A. Those are the figures I had, yes, sir.

Q. And in the preceding five school years, from '62 to '67, there were 26 white students going to Kiser and 58 white students going to Colonel White?

A. That would seem logical, but my notes give '62 to '65, and I'm not sure what it is.

Q. You are missing a couple of years there?

A. Apparently. I may have made simply a mismark.

Q. All right. This optional area was created in 1962, was it not?

A. I believe so, yes.

Q. And all of the students in the area appear to have been white students, were they not?

A. I believe so.

Q. Colonel White appears to have been the school of

choice of these students if we look at the figures as to who went where, at least up until the last four years?

A. I believe so, right.

Q. Then you gave us on your direct examination the student composition figures between Kiser and Colonel White for '67 to '72.

As of 1962, when this optional zone was created, both schools were predominantly white schools, weren't they?

A. Yes, that is correct.

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[R. I. 1642-1643, Vol. 16] Q. And then the change that came in the optional area came about at a time that Colonel White changed to a four-year high school, so that it was no longer necessary for the students to matriculate from Colonel White up to Fairview?

A. That's correct.

Q. And the only change that was effective at that time was to carry the rest of the option down to the natural boundary of Wolfe Creek, and the change really only involved a couple of city squares, didn't it?

A. In terms of actual residential area, you mean?

Q. Yes.

A. I believe that is reasonably accurate, yes.

Q. All right. Now, at the time these few squares were added to the optional area so that all of the students in that area could go either to Colonel White or to Roosevelt High School, the population of the optional area was predominantly white, although there were some blacks living there, isn't that true?

A. I believe that's correct, yes.

Q. The optional area itself hasn't changed at all, has it, insofar as its boundaries are concerned, in the fifteen years that have passed since 1957?

A. I don't believe so, no.

Q. The population of the optional area, however, has become predominantly black, isn't that true?

A. I would judge so, yes.

Q. And if the school board had wanted to use this optional area as a device for keeping blacks out of Colonel White High School, it could easily have transferred the entire area back to Roosevelt with hard boundaries once the population changed, couldn't it?

A. Well, I think under the freedom of enrollment business they would have been able to go in anyway if there had been capacity in Colonel White.

Q. Freedom of enrollment didn't come in until 1969, did it?

A. That's right.

Q. The effect of this optional area has been to bring more black students to Colonel White High School, has it not?

A. Only in the past three or four years has that had any effect.

Q. Since 1968?

A. That's my understanding, yes, sir, my figures.

I don't have figures between '63 and '68.

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[R. I. 1679, Vol. 18] THE WITNESS: Well, I think you do what you can in a situation like this, and I think we suggested some of those things of making different choices in terms of boundaries and in terms of additions, and I think the Board took the worst possible move that it could in this whole west side situation and, in fact, hastened the impaction of this area and made it quite clear to all concerned that this is where it was headed, but basically I think I would agree with what has been said that as it does work out in fact in some cases, this may be simply a delaying tactic, and I don't think that anybody knows that when you are doing it. You can guess and make predictions.

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[R. I. 1683-1687, Vol. 17] Q. Dr. Foster, did you testify, and I understand that you did testify, that in your opinion

what was done in the west side determined or communicated what was intended to happen in that area? Was that your testimony?

A. I believe it was, yes, sir.

Q. Dr. Foster, let us assume that instead of making the changes that were indicated, for example, carving out – I believe this Miami Chapel-Whittier option was carved out exactly from the Wogaman zone, that portion in Greene, is that correct?

A. I believe that's what we testified to, yes, sir.

Q. Instead of doing things like that, Dr. Foster, if they had taken white children from many of these areas and assigned them to Wogaman instead of leaving a cored area of black schools, if they had assigned 60 percent of the enrollment as white students to Wogaman and 60 percent of Willard's enrollment is white, and 60 percent of Garfield is white, and then taken the black students from those schools, whether they shrunk the boundaries or adjusted them in other manners, and assigned them to other schools in this area, would that have changed the perception of what was intended to happen in there?

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A. Well, I think this is the crux of what I have been trying to say. So far as I know, this characterized the duality of the date and system in that in my analysis I remember no place where white students to any degree were in fact assigned to black schools, and at the point that a system begins to do that, then I think they are serious about desegregation.

BY MR. LUCAS:

Q. Would that in your opinion have any effect on the stability, in terms of the change in the area? Assume an assignment of a substantial number of whites to those schools.

A. Well, to the extent that school patterns and residential action interreacts, I think it would, yes.

Q. The Court also inquired, Dr. Foster, about the question of other remedies.

What effect, if any, does school construction, selection of alternate locations for schools, and school additions have on the racial composition of the schools?

A. Well, I think I've testified that in my opinion the building additions that were used in Dayton by and large in a sense took the place of changing zone lines in terms of maintaining existing racial patterns and compacting them.

Q. Are you familiar, Dr. Foster, with the Nashville plan, where the court forbade the construction of any additions to the outlying white schools which were not desegregated under the plan?

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A. Yes, I am familiar with the Nashville plan.

BY MR. LUCAS:

Q. And what effect would such policy of restricting construction of predominantly white schools have in the context of a system-wide desegregation plan?

A. Well, it essentially makes it more difficult for whites to take advantage of spaces available in the suburban areas.

Q. Now, Dr. Foster, in terms of the cross examination about the criterion, the what you call common perceptions of the neighborhood school, you testified that the walk-in school was one of the perceptions, is that correct?

A. That's correct.

Q. In the State of Ohio, and I believe your testimony was this, that between 40 and 50 percent of all children ride to school on a school bus.

Does that indicate a neghborhood pattern of attendance in the state, or what does it indicate?

THE COURT: Mr. Lucas, that question really is quite deceptive.

Would you restate that in terms of the percentage that are bussed in metropolitan areas?

I'm a native of Ohio. I'm quite familiar with the extensive bussing that goes on in rural areas.

Dr. Foster observed at one point of the consolidation procedure that this is well known in the State of Ohio, but that figure standing alone really has no meaning.

It had no meaning when Mr. Greer mentioned it. But I would be interested to know of similar information in metropolitan areas.

Do you know, Dr. Foster?

THE WITNESS: I'm afraid I don't.

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T. TESTIMONY OF NELSON WHITEMAN.

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[R. I. 1748-1750, Vol. 17] Q. All right. And then the counsellors made the decision as to how many students would get in. And how many would you take in an average class before 1968?

A. Well, before 1968 we would take most anyone that applied, providing he was passing and had a good attendance record.

Q. Okay. Before that time, since 1914, really, when it was founded, Patterson had operated below capacity, is that correct?

A. That's right.

Q. In 1968 — I'm sorry. Let's go back.

Were you there in 1953?

A. I came there in the fall of 1953.

Q. All right. Was there any black teachers at Patterson at that time?

A. No, sir.

Q. Were there any black counsellors?

A. No, sir.

Q. And the admission process was through black counsellors, is that — I'm sorry. Through the counselling department in each division?

A. Yes.

Q. All right. And how long a period was it before you had any black teachers at Patterson?

A. I can't answer that exactly. In the early '60's we had one black teacher in the medical arts department, but I can't —

Q. I'm sorry? What department?

A. Medical arts, but I can't tell you the years.

Q. All right. When did you get your first black counsellor?

A. '68 or '69.

Q. So until that time the primary admitting unit, or until 1968 at least, the admission process was through the counsellor, and you had no black counsellors, is that correct?

A. That's correct.

Q. By 1969 how many black teachers did you have?

A. 1968?

Q. Yes.

A. I don't know that we had any. I can't say for sure but I don't know that we had any in 1968.

Q. Was it the '69-70 school year that you got your first black counsellor?

A. I would guess the '69-70 school year, yes.

Q. Right. Now, was it the '68-69 school year that you had the policy change about the 10 percent?

A. No. The '68-69 school year was the first year for the freshman class.

Q. All right.

A. And the 10 percent was established for the first year because the total enrollment city-wide was 5,000, and we were shooting for a mark of 500 freshmen.

Q. So you took the 10 percent for each school for the '68-69 school year?

A. Right.

Q. That's what I want to understand.

Now, what was the admission process, the '68-69 school year? If you can just sort of trace for me, what the average child who was interested in Patterson, what process would he follow to get in?

A. Okay. In the '68-69 year we visited the elementary schools and we put on a program that was very similar to the one we put on in the high schools, to present to the students

the opportunities that were available to them at Patterson Co-op.

Q. Was this an all white presentation team?

A. In '68-69, probably.

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U. TESTIMONY OF WALTER M. BAGWELL.

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[R. I. 1848, Vol. 18] A. Right.

Q. And so instead you built additions in a particular area and you avoided the problem of boundary adjustment.

A. Right.

Q. Would you agree that in effect then, when you add — put an addition to a school, that as far as that space is concerned, you determine the boundaries and they are coextensive with the original boundaries of the school? Is that a fair statement?

A. I would say so.

Q. Pardon?

A. Yes.

Q. All right. So that if a school is already 100 percent black and you are making an addition to that school, you in effect have determined the boundaries to be that creating a hundred percent black school unit?

A. That's right, in most cases it was.

Q. All right. And for those primaries that opened a hundred percent black or white, the same would be true, although we call those new schools?

A. Right.

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V. TESTIMONY OF RALPH CURK.

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[R. I. 1922, Vol. 19] Q. But it was the co-op school for Patterson; is that correct?

A. That is correct.

Q. Now, this was a city-wide ninth grade. Were there any other ninth grades in the System that you know of?

A. Not to my knowledge.

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W. TESTIMONY OF WILLIAM GOFF.

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[R. I. 1962-1963, Vol. 19] Q. What had been the practice of the Board with respect to transportation of students insofar as distances are concerned?

A. You mean prior to this policy?

Q. Prior to and after 1966.

A. Well, after 1966 the policy as it is stated here, did establish a 1.2 radial distance from an elementary school, that is outside the 1.2 mile, being a transportation area.

It also set up a series of criteria for high school transportation, too. The State law, as you are probably aware, does require only that students who are in elementary schools be transported if they are two miles or more from their school of attendance. This was at this time.

Q. All right. Was that the practice and policy of the Board?

A. The practice of the Board made use of the permissive part of the law which allowed over one mile from the school. So the 1.2 mile policy that was established here fit into the practice that was being exercised in 1966.

Q. What were the financial implications of the Board's transportation policy in the '60's?

A. Well, as a flat rate school district, the district received nothing for any kind of transportation of regular students.

There was reimbursement for handicapped children attending Gorman School for Crippled Children.

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[R. I. 1998, Vol. 20] A. The primary limitation in setting up the sites was the one and a half mile direct travel distance which was the transportation policy so that the youngsters could walk to the school rather than be involved in transportation. There were a number of other sites suggested, were there not? If I can name a few, tell me if I am correct. Jane Addams was suggested as a middle school, was it not?

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Q. Jane Addams, Meadowdale, Brown, Emerson, Kiser, were those some of the other schools?

A. I think some of these were identified in an Ohio State study prior to the time that we finally set them up, yes, sir.

Q. Emerson is actually a former junior high school; is that correct?

A. I believe so.

Q. And that would make it particularly suitable for conversion to a middle school?

A. Yes.

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X. TESTIMONY OF LORANA MADELINE DORSEY.

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[R. I. 2013, Vol. 20] Q. Was there a swimming pool?

A. Yes.

Q. When you were there, how many black students were there? Were there a lot or a few?

A. Not over 25, as I recall.

Q. All right. Were black students permitted to use the pool?

A. No.

Q. Was there a meeting between black students and the representatives of the school?

A. There was.

Q. And what was the purpose of the meeting?

A. To ask the reason why we weren't permitted to use the swimming pool. They would take it under consideration they said, but nothing came of it.

THE COURT: Mr. Lucas, I would like a date.

MR. LUCAS: Yes, sir.

BY MR. LUCAS:

Q. When did you graduate from Stele?

A. 1930.

• • •

VII. RELEVANT PARTS OF THE RECORD OF THE REMEDIAL HEARINGS HELD IN DISTRICT COURT IN FEBRUARY OF 1975 (R. II.).

A. TESTIMONY OF ROBERT O. GREER.

[R. II. 156-157] Q. What advice did you give with respect to the subject first of just pairing of schools?

A. Our advice after consultation with regional specialists and others was that pairing in the city of Dayton would seem to be not appropriate at this time in 1975.

Q. And why is that?

A. You are quite familiar I am sure, Mr. Lucas, with the different enrollment patterns and enrollment fluctuations since 1968 and since 1971 and 1972. The Dayton School System has lost a little over 10,000 pupils, a little over 1,500 in the high school grades and the others in elementary. That is one complete high school. You could pull out of the other 7,500 several elementary schools.

When you look at this loss pattern and we looked at the proximity of buildings now existing, you would have to have close proximity of different types of buildings racially in order to make the kind of switch and pairing that is necessary.

Q. You are assuming only contiguous pairing; is that correct?

A. No. Do you want me to complete that?

THE COURT: Please continue.

THE WITNESS: It was our feeling that if pairing were done with contiguous kinds of pairing, that this, then, would require a number of boundary changes, a number of pairing changes within rather rapid periods of time. The turnover rates in most of the big cities including Dayton in pupil population is very rapid. You may find some classrooms that change completely during a grading period because of mobility of the population, black and white.

Therefore, it seemed unwise to us to advise at this time using a method that has not been working too well either in other systems during the last five years or in the city of Dayton based on the enrollment pattern.

* * *

[R. II. 182-87] Q. Now, if I understood your earlier testimony correctly, you have indicated that in your opinion one of the problems with pairing and similar concepts in Dayton arises from the mobility of the Dayton population.

A. Right.

Q. With respect to mobility within the school system itself, could you explain to us what you mean?

A. This is what worried us when we listened to the various reports and went back over our mobility excuses over the past five years at least. I don't know whether people in big cities like Dayton move because of jobs or housing or because they are forced to move because of absentee landlords or what. That wasn't our purpose to find out, but in fact children and parents do move frequently in a city such as this and they are moving frequently here from one area to another, and as I said earlier, I think, to Mr. Lucas in response to one of his questions, you may have an entire room in a grade level change every six weeks.

Now, this is an awful thing for a teacher to face who doesn't understand all these varied kinds of people without staff development, and it is an awful thing to try to pin down enough to say let's pair this building with this building right across here and in a number of cases as you look at Dayton, you are going to be pairing an all black building with an all black building and that is not going to help anything or if you pair it with a building that may be all anglo in certain sections, you are pairing poverty with poverty and that doesn't answer any question.

It was our belief that the system should look at the methods which would bring together a multi-ethnic and multieconomic kind of grouping with their offerings or at least offer some kind of method which would bring more of different kinds of people in different economic levels together so they could all learn about everybody's contributions without pairing poor and poor or black and black.

I don't know. Did I answer your question?

Q. Yes. I think you did.

You also discussed a different type of mobility which was mobility out of the school system itself, and could you explain for us what has been the pattern in Dayton and in similar communities with regard to that kind of mobility?

A. Well, in any system where you have over an extended period of time confrontation and lack of confidence and credibilty of the system, and in credibility of the system I don't mean to be derogatory about Dayton. This has happened in every big city in this country where people have lost confidence in State Departments of Education as well. They say none of us are doing anything. You can immediately start looking for the flight of people to the suburbs, the greener pastures, and at first we looked and we said okay, white is running. That was the common term, and we took a good hard look and we found out the affluent black was running too, and we were all running from the poor and from those who we considered less learned. We were running from the places where industry had decayed in a city. We were running from

where jobs were different and we all seemed to want to find the place that was perfect for us on the fringes of a city.

First you moved to one edge of the city and then completely out of it and if you follow the pattern in Dayton, it is just like every other big place where this has gone on for a period of years.

Now, if the affluent whites move and the affluent blacks run either outside or to parochial schools or some other place, you have left a city of poverty and whatever. It can be black, it can be Appalachia, or anything else, any kind of mix, but you just have a poor city and a poor school system.

What we were trying hopefully to discuss with the School Board when we met with them and the Administration was get your minds on building the kind of quality that will hold all the people in the system and then if you have got to build buildings to get them back together, then build a better rat trap and call the population back. You might as well do it as a school system because the businessmen are sitting out there waiting until the whole thing decays and they will buy it up and build up the most beautiful kind of city all over again and maybe the same folk that are in it won't even be there.

I apologize, Your Honor.

THE COURT: To the contrary Mr. Greer, in a problem that has complexities beyond my ability to understand, you have been very helpful.

You may proceed, Mr. Greer.

BY MR. GREER:

Q. Has the experience with certain types of desegregation plans including pairing techniques been to accelerate this movement out of the inner city process you have described?

• • •

THE WITNESS: As I answered before, in specific instances, pairing just wouldn't work because of the types of youngsters and economic level of the areas and the fact that

usually in inner city you will find a number of elementary schools have been built as the black population increased in the inner city. Another elementary school was stuck up to take care of the overload, so you had so many black schools until there is hardly anything to pair them with, and if you did pair across, it is with another elementary of poverty over here at the other racial level that happened to get stuck on the edge of that ghetto.

The poor are always there with us, and I don't care what color they are, cities have just stuck them in these situations, so the level and quality of educational offerings is not good for white or black.

• • •

B. TESTIMONY OF GORDON FOSTER.

• • •

[R. II. 199] Q. State your full name and occupation, please.

A. Gordon Foster. I am a professor at the University of Miami in Coral Gables, Florida.

MR. LUCAS: Doctor Foster's qualifications have already been tendered to the Court.

THE COURT: Yes.

BY MR. LUCAS:

Q. Doctor Foster, have you had an opportunity to examine Defendant's proposed plan of desegregation?

A. Yes, I have.

• • •

[R. II. 223-227] Q. Do you know what the approximate cost of the total magnet school program has proposed in the Board's plan was?

A. As I recollect, it was around three or four million dollars.

Q. I believe the record will speak on that.

Turning your attention to the other elementary magnet programs, can you identify them?

A. There were three magnet programs. One was modern foreign languages at Carlson which would include three blocks in a day in terms of timing with approximately 120 children in a block which would make a potential of 360 students. I believe this was intended to be held on opposite days or opposite schedule from the science business so that it wouldn't interefere with that.

There was a business education skills program at Huffman, and this was for grades 6, 7 and 8 which would encompass approximately 300 students, and the third program was at Kemp which was a career motivation center which was anticipated to interest approximately 220 students at the fourth and fifth grade centers for two two-hour session a week. This is really very much like the current career opportunities programs that are being offered all over the country.

Q. All right. Is it your understanding that these are all part-time programs?

A. That's correct.

Q. And that the base enrollment in each school at Carlson and Huffman would remain the same?

A. That's correct, and the children would be transported in.

Q. Is it your understanding that these programs would use only the excess capacity at the respective buildings?

A. Yes.

Q. Have you examined the freedom of enrollment policies and the results of the freedom of enrollment and transfer policies in the plan?

A. Yes, I have.

Q. Can you describe those results?

A. Well, as I understand the plan, there were two basic plans that had to do with freedom of enrollment or open enrollment. One was called open enrollment which was for high schools only, and that was started just a year ago in January of 1974, and to the best of my knowledge, I found

no reports of how many children moved for open enrollment in this program in a desegregated section. There were no numbers reported at all by race.

Q. Is that the one where they have an enrollment period prior to the opening of school?

A. I understand a child picks three choices, a first, second and third choice and he runs through a randomized process of some sort and if he doesn't get in that, why, then, he is assigned to his nearest high school, capacity being considered.

The freedom of enrollment is essentially what we call a majority-minority transfer program, and the figures for that are given in Exhibit A to the Board's plan. Well, it is really Exhibit B. The figures are 391 in the high school for the 1973-74 school year, and a total of 346 at the elementary and middle schools for that year. Those figures which add up to 737 coupled with carryovers from prior years of 613 and a second semester figure for 1973-74 of 258 give a total of 1,608 students in schools other than their neighborhood schools.

Q. How many of those were black children going to predominately white schools?

A. Well, I have a racial breakdown of receiving schools only for the one year of 1973-74, first semester. That was the 737 figure.

The way I read the data, all but nine of those would be black children going to white schools which I believe was your question.

Q. Viewing the entire desegregation proposal of the Board of Education proposal and the number of children affected by such a plan, do you have an opinion as to its effectiveness as a plan of desegregation?

A. Yes. My opinion is that basically it is a curriculum plan rather than a desegregation plan, that something like a total, a maximum of 6,400 part-time and full-time students could be affected by this plan, and many of those would only be in partially desegregated situations at best. Out of this approximately 6,400 maximum figure, about 3,000 would be what we might call full-time desegregated students. Those

would be the ones at Stivers-Patterson Co-Op and Kiser and Miami Chapel Elementary School.

Secondly, there is no guarantee of the desegregative effect we all know of this program. I think some of the programs are likely to achieve some desegregation although minimal and some will maybe strike out.

Based on past experience in other systems, one would have to be somewhat less than optimistic about the total effect. I think we have mentioned the fact that in the schools where there is just a program such as at Roth, Dunbar, Huffman, Carlson and Kemp, desegregation is essentially not desegregation. It is just a group of kids coming in in an intact group.

Q. In a what?

A. It is a group of pupils being transported into those schools in an intact group, sometimes in smaller groups, but always staying apart from the rest of the school program.

• • •

[R. II. 228] Q. Doctor Foster, at the request of the Plaintiffs, have you prepared a desegregation proposal which has been submitted to the Court and to the Defendant School Board?

A. I have, yes.

• • •

[R. II. 231-233] Q. Did you have that as any sort of inflexible standard or was that a goal?

A. No. I think you will find in the estimates of the individual schools that some of them got a little bit outside that range. The object, in other words, was not to racially balance a system but to remove the racial identifiability of any individual school insofar as possible. There is quite a difference. The techniques as in most desegregation plans were to take the easier things first and see what that would do.

The way the demographic situation rests in Dayton, there are very few instances where you can redraw zone lines between contiguous schools and effect any degree of desegregation. The schools that are in the buff area between the white

population and black population generally are already in a desegregated mix, and then when you get farther out from that center of desegregation, you run into a situation where you are contiguous no longer and at that point you need to consider pairing or clustering.

As was stated this morning or at least partially stated, clustering or grouping is an extension of pairing. Pairing is essentially two schools put together. A clustering or grouping can be two or more.

In a system that is approximately even in racial makeup, pairing works very well if capacity is the same because you can pair one 50-45 per cent black school usually with a white school on the opposite side, only it would be like 90 per cent versus 90 per cent.

Where you run into clustering more than two schools, you usually do it because you have a differential in the capacity which necessitates putting more than two schools together to come out.

So, essentially, the plan developed a serious of elementary clusters. It left four schools the way they are and the original plan recommended we close three schools, and I have an amendment to that if we want to discuss that so that the plan would not involve any closing of elementary schools.

• • •

VIII. RELEVANT PARTS OF THE RECORD OF THE REMEDIAL HEARING HELD IN DECEMBER OF 1975 AND JANUARY OF 1976 (R. III.).

A. TESTIMONY OF WILLIAM M. GORDON.

* * *

[R. III. 18] Q. Could you state your name, sir?

A. William M. Gordon.

Q. And what is your employment?

A. I am an Associate Professor of Education at Miami University.

Q. And what is your relationship to the plan which we have presented to this Court?

A. I directed the team that put the plan together.

* * *

[R. III. 45-46] Q. Would you consider it an adequate desegregation plan if all of the schools, the elementary schools in Dayton which were presently identifiably black schools ended up with the 70 percent black or the higher percentage black and all of the formerly white schools ended up with the higher percentage white?

A. I would hate to see that considered as an implemented plan in the City of Dayton.

Q. Would you want to randomize the proportions?

A. Yes. I would say if that happened, that it would meet those parameters, and if those parameters were acceptable to the Court, I guess then that would be considered a desegregated school system. I don't think it is desirable.

Q. Would you consider that desegregation of the system?

A. No. I would much prefer to see the schools not identifiable, and I think if a school has been historically a white school and then just comes into the bare minimum figures, that it probably would still be perceived as a white school or a black school.

* * *

[R. III. 52] THE COURT: * * * That continued to move to the suburbs is not something that results from the desegregation order, is it?

That has been going on in Dayton for the last 20 years?

A. It was established today approximately 11,000 white youngsters and 900 black youngsters have left Dayton in the last five years.

Q. There has been a substantial out white migration in most urban centers; is that correct?

A. Yes.

Q. And that is without regard to desegregation; is that correct?

A. Yes, it has been going on. In some instances with desegregation and in some instances without.

* * *

[R. III. 61] Q. Am I correct that the open enrollment program does not result in substantial desegregation?

A. Well, we are in Court here now, so I would say yes, you are right.

Q. That is a conclusion at page 30 in your report, is it not?

A. Yes.

Q. Do you have figures indicating how many white students chose formerly black schools on open enrollment? Is that not set forth in the document?

A. Yes, it is in the document.

Q. Was it one, two or three?

A. It is a very small number. I think it was one. I am not sure.

* * *

[R. III. 71] Q. If that pattern reflected that all of the formerly black schools were one-third white and all the formerly white schools were two-thirds white, would that be a racial pattern in your opinion?

A. Yes.

* * *

[R. III. 282-285] MR. LUCAS: This is an offer of proof in connection with the testimony of Dr. Gordon. The Court has indicated that plaintiffs could not inquire of Dr. Gordon into the basis for the rejection of the concept of pairing and clustering of schools, and in particular insofar as it pertains to page two of the cover letter to the board transmitting the board's expert's plan.

That cover letter recited that the reason for not using pairing and clustering was because such pairing and clustering tended to cause white flight. Throughout the document marked Exhibit A on behalf of defendants, there are references to white flight and reasons why actual desegregation was not attempted using one of the major criteria under the Swan case.

Reference is frequently made to the articles by James Coleman, one of which is appended as an appendix to the plan, Exhibit A in this record.

If permitted to inquire by the Court, I would offer as Exhibit I to this offer of proof and this record an article appearing in the New York Times July 11, 1975 entitled "Coleman Concedes Views Exceed His Race Data."

In particular, I would have directed the witness's attention to the following paragraphs:

"In answer to questions, he said that his study did not deal with busing, and that his arguments applied to trends in only two or three southern cities.

"Some of the things I said went somewhat beyond the data," he said.

The New York Times article goes on to point out as follows: "However, a thorough check of all 20 cities — in which key officials in each were questioned by telephone — could find no court-ordered busing, rezoning or any other kind of coerced integration in any of the cities during the 1969-1970 period."

Newspaper articles are appended throughout Exhibit A, the proposal submitted to the Court by the board. Therefore, this article would have been offered in response.

I would also offer a document which I will mark Exhibit II, an article entitled "A Response to Professor James S. Coleman's Recent Research and Statements on Educational Desegregation Efforts" by Robert L. Green, Dean of College of Urban Development and Professor of Educational Psychology at Michigan State University, East Lansing, Michigan, and Thomas Pettigrew, Professor of Social Relations at Harvard University, Cambridge, Massachusetts.

I would have also offered an article appearing in, I believe, the American Association of School Research Journal, the exact title I cannot recall, an article titled "Reanalysis of Coleman's 'recent trends in school integration'" by Gregg Jackson of the U. S. Commission on Civil Rights. That would have been Exhibit III.

I would have also offered an article by Dr. Robert L. Green entitled "On Professor James Coleman and busing — white flight" as Exhibit IV.

As additional support, I would have offered an article from the Dayton Daily News dated Sunday, December 7, 1975 written by Tom Teepen, editor for the Daily News editorial pages. This would be Exhibit V. Similar articles from local papers were offered by the defendants. This article is entitled "SOS Exaggerating 'White Flight' Menace Not Up To Its Billing".

I would have also offered in evidence an article from the Dayton Daily News dated December 8, 1975, page one, entitled "Dislikes busing, desegregation case puts Rubin on spot" byline article by Jonathan Miller indicating that the Court has expressed concern about some of the issues which could have been explored had the Court permitted me to examine the witness in full on this area. It is significant to note that the article indicates that the Judge of this court is concerned that a busing-based school desegregation plan "may so alienate white members of the community that short-term school desegregation may lead to long-term city segregation."

We do not represent that we know these to be the views of the District Court, but that these have been represented to the public at large as the views of the District Court. Of course, the witness's answers to questions might have led to

other lines of inquiry which would have further exposed the reasons for their rejection of one of the Swan techniques tending to demonstrate their choice of a less effective alternative reflecting on two factors; number one, good faith and, number two, intent to segregate.

(End of proffer.)

° ° °

B. TESTIMONY OF LARRY W. HUGHES.

° ° °

[R. III. 111] Q. Dr. Hughes, did you agree with the statement of the report that appears on page 127 that says it has been found that the relative closeness of Dayton Schools makes long-haul transportation an issue in many cities moot here?

A. I generally agree with that statement. I think it makes it a less pressing matter.

° ° °

[R. III. 141-142] [Q.] What I am concerned about is whether or not in desegregating elementary or secondary schools, you should end up with a pattern of schools where all the formerly black schools were 70 percent black and all the white schools were 70 percent white.

A. I don't think that would be good.

° ° °

C. TESTIMONY OF JOHN B. MAXWELL.

° ° °

[R. III. 200] Q. State your full name and your occupation, please.

A. John B. Maxwell, Superintendent of Schools in Dayton, Ohio.

° ° °

[R. III. 202-204] Q. All right. Has the Board of Education adopted any plan for submission to this Court?

A. No.

Q. Has the Board of Education taken a vote on submission of a plan to this Court?

° ° °

THE WITNESS: The Board voted 7-0 to submit the plan but not approve it.

Q. All right. Was there a vote taken on the adoption of the plan by the Board?

A. No.

Q. It was not a motion to adopt the plan, endorse it?

A. There was an amendment to the motion which was defeated.

Q. And the amendment was of what nature, sir?

A. The amendment was to approve the plan, and this amendment was turned down.

Q. And the vote was what?

A. 4 to 3.

Q. Did you make a recommendation to the Board as the chief school officer for the District as to whether or not it should approve this plan that has been submitted to the Court?

A. No, I didn't.

° ° °

THE WITNESS: No, I did not.

Q. Has the Board taken any position with regard to some other plan which it would approve for submission to this Court?

A. No.

° ° °

D. TESTIMONY OF GORDON FOSTER.

° ° °

[R. III. 205] Q. State your full name and occupation, please.

A. Gordon Foster. I am a professor of educational administration at the University of Miami in Coral Gables, Florida.

Q. Dr. Foster, your qualifications have previously been furnished to the Court and you were qualified as an expert with the Court.

THE COURT: There is no question. Dr. Foster is an expert in this field, and I am pleased to hear from him.

• • •

[R. III. 230-232] THE COURT: Okay. So, if we have a school 33 percent black and 67 percent white, that is not racially identifiable?

THE WITNESS: No. I think what you are referring to is I was speaking about the high schools, if all the white schools come in at 33 percent black and all the black schools come in at 67 percent black or the formerly black schools and white schools, then I would hold they still maintain a racially identifiability rather than if they came in randomized.

THE COURT: Then, racial identifiability is not a function of percentage of students?

THE WITNESS: No.

THE COURT: But you just said that a school formerly –

THE WITNESS: Well, then let me say that it is not the sole function.

THE COURT: And you would draw a distinction between the 67/33 and the 36/64? The three percent would make a difference to you?

THE WITNESS: No, I wouldn't argue too much about that. The thing I would argue more about is, as I say, all the formerly white schools are still predominantly white.

THE COURT: Let's assume we turn it completely around. We will take all the white schools and make them 30 percent white and 70 percent black. What is your view of the racial identifiability there?

THE WITNESS: It would be a lot less than it would be previously, but I think a randomized assignment so that you

don't have any relationship to what went on previously, any fixed relationship, is much better in terms of community perception about racially identifiable schools.

THE COURT: You may proceed, Mr. Lucas.

• • •

Q. Dr. Foster, is what you are saying that you cannot consider any school in isolation from the system in which it exists?

A. Yes. Well, that is one thing.

Q. Dr. Foster, are you familiar with efforts by some school boards to set up a pattern whereby the white schools remain whiter and the black schools remain blacker without reference to particular systems?

Is that something that school systems sometimes try to do?

A. Yes, sir.

Q. Does that protect usually the controlling white population or the white power in the School Board?

• • •

THE WITNESS: Quite often it does, yes.

• • •

[R. III. 249-251] THE WITNESS: As I remember in my response to you [the District Court], I said that that fact coupled with the situation that all the formerly white schools were in the 70 percent range and the formerly black schools the other way around – I am sorry – all the formerly white schools were at 30 percent black and the formerly black schools were at 70 percent black coupled with this difference in my opinion tended to make them racially identifiable.

THE COURT: You may proceed.

• • •

Q. As far as that type of thinking goes into racial identifiability, wouldn't it be true even if you filled Dunbar High School fully with white students, people in a few years are going to recall that as being a so-called black school?

A. As a school that used to be a black school.

Q. And the same thing would be true if you filled Belmont with entirely black students?

A. Yes, sir.

Q. But as far as your own definition of racial identifiability is concerned, that is simply a situation where any school falls drastically outside plus or minus 15 percent from the mean percentage in the school district, isn't that correct?

A. Well, that is part of it. The other part is what we discussed earlier, and that is that you can't consider any one school in exclusion from the rest of the system. The biggest problem is if you have all formerly white schools still predominantly white in a system like Dayton that is about 50-50 and all formerly black schools are prodminantly black. Then, there are quite a few shades of lingering identifiability in my opinion is what I am saying.

Q. This is the third time you have testified in this litigation, is it not, Dr. Foster?

A. I think so.

Q. And do you recall testifying last spring in this case saying, "Well, I think in the final analysis, racial identifiability depends on the individual court's judgment, but my definition in a system that approaches 50 percent black and white would be any school that falls outside drastically plus or minus 15 percent from the mean at any given level."

A. That sounds reasonable that I so testified, yes, sir.

Q. And do you still feel that is a reasonable definition?

A. Yes, sir.

• • •

[R. III. 252] Q. Is it your feeling that in order for a plan of desegregation to be appropriate, there must be an approximate racial balance in every school in the system?

A. No, sir, not necessarily.

• • •

[R. III. 255-256] Q. Under your definition of racial identifiability, would it be fair to say that in the Dayton system

if each school had a one-third to two-thirds proportion of either race, you would not consider the school to be racially identifiable?

A. That would depend on other circumstances also such as faculty assignment, the sort of situation that I described in option B of Dr. Gordon's plan. Numerically, you are right. I would consider those schools not to be racially identifiable, but when coupled with the sort of problem that has been described in option two of the high school plan, then I would have some doubt.

Q. If you get beyond simply numerical consideration of proportions so that you have a mixture of black and white students in a school, don't you get into situations that any school in a black neighborhood is going to have a certain type of perception or any school that has a certain name of past history is going to have a certain type perception?

A. It has not been my experience, no, sir, in desegregated systems. I think after a couple of years the public and the school people, the pupils, everybody tends to begin to perceive of schools as just schools and not as black schools or white schools.

• • •

Supreme Court, U. S.
FILED
MAR 15 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume II – Exhibits

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-539

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN, and
PHILLIP BRINKMAN,
By Their Mother and Next Friend,
Donna Brinkman, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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Petition For Certiorari Filed October 18, 1976
Certiorari Granted January 17, 1977

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PLAINTIFFS' EXHIBIT 2A

ONE RACE SCHOOLS AND CLASSROOMS
in ONE RACE SCHOOLS, 1972-73

SCHOOLS		
Total Schools	68	100%
Schools with pupil racial composition 90% or more Black	22	32.3
Schools with pupil racial composition 90% or more White	25	36.8
Schools with pupil racial composition 90% or more Black or White	47	69.1

CLASSROOMS	#	% of Total
Total Classrooms	1,390	100%
Classrooms in schools with pupil racial compositions 90% or more Black	464	33.4
Classrooms in schools with pupil racial composition 90% or more White	647	46.6
Classrooms in schools with pupil racial composition 90% or more Black or White	1,110	80.0

Source: D. P. S. Enrollment Data and Division of Research Compilations

PLAINTIFFS' EXHIBIT 2B

1951-52 OVERVIEW

Number Schools	47
Enrollment	34,948
Black Pupils	6,628
% Black Pupils	19.0
White Pupils	28,320
% White Pupils	81.0

ONE RACE SCHOOLS

Number 90+ Black Schools	4	90+ White Schools	34
No. of Black Students	3,602		0
% of Black Students	54.3		0
No. of White Students	0		23,514
% of White Students	0		83.0

Total Schools	38
Total Students	27,116
% of Total Students	77.6

Source: D. P. S. Enrollment Data

PLAINTIFFS' EXHIBIT 2C

1963-64 OVERVIEW

based on Ohio Civil Rights Survey. (School Data)

Number Schools	64	(66)
Enrollment	57,361	(59,091)
Black Pupils	15,987	(18,377)
% Black Pupils	27.8	(31.1)
White Pupils	41,374	(40,714)
% White Pupils	68.9	(68.9)

ONE RACE SCHOOLS

Number 90+ Black Schools	13	90+ White Schools	43
No. of Black Students	12,665		361
% of Black Students	79.2		2.2
No. of White Students	391		37,544
% of White Students	0.9		90.7

Total Schools	57
Total Students	50,961
% of Total Students	88.8

Source: Ohio Civil Rights Survey

PLAINTIFFS' EXHIBIT 2D

1971-1972 OVERVIEW

(Including Pre-school Enrollment, as of October 1971)

Number Schools	69	
Enrollment	55,142	(Actual Enrollment - 53,936)
Black Pupils	23,544	
% Black Pupils	42.7	
White Pupils	31,598	
% White Pupils	57.3	

ONE RACE SCHOOLS

Number 90+ Black Schools	21	90+ White Schools	28
No. of Black Students	17,871		759
% of Black Students	75.9		3.2
No. of White Students	287		22,171
% of White Students	0.9		70.2

Total Schools	49
Total Students	41,088
% of Total Students	74.5

Source: D. P. S. Enrollment Data

PLAINTIFFS' EXHIBIT 2E

SCHOOL SEGREGATION OVERVIEW

Black Schools

Of the 4 schools 90% or more black in 1951-52, all continue * 90% or more black in 1972-73.

Of the 13 schools 90% or more black in 1963-64, all remain 90% or more black in 1972-73.

Of the 21 schools 90% or more black in 1971-72, all remain 90% or more black in 1972-73.

White Schools

Of the 25 schools 90% or more white in 1972-73 all opened 90% or more white and, if open, were 90% or more white in 1971-1972, 1963-64, and 1951-52.

* In 1962 the Dunbar High School Building was converted to the McFarlane Elementary School, a new Dunbar High School opened, and the Willard and Garfield schools were closed and their pupils assigned to the McFarlane School. McFarlane opened with an all black student body and faculty; Dunbar opened with a virtually all black staff and pupil population and in 1963-64 enrolled a pupil population 99.61 black.

Source: D. P. S. Enrollment Data, Ohio Civil Rights Survey, D. P. S. Research Division Compilations.

PLAINTIFFS' EXHIBIT 4

1950 to Date: RACIALLY IDENTIFIABLE CLASSROOMS OPENED (NEW SCHOOLS OR ADDITIONS) WHICH REMAIN PREDOMINANTLY BLACK OR PREDOMINANTLY WHITE IN PUPIL RACIAL COMPOSITION*

	School	Year Opened	AT OPENING % White Pupils	AT OPENING % White Faculty
Black	Dunbar	1962	less than 10 (7.3 in 1963)	5
	Carlson	1958	5	0
		1967	0.9	16
	Edison	1971	1.2	62
	Greene	1969	2.5	20
	Jackson Prim	1963	0.1	39
	MacFarlane	1954	0.0	0
		(1962)	0.0	0
	McNary	1964	0.0	35
	Miami Chapel	1953	0.0	15
		1954	0.0	7
	Residence Pk Prim	1966	(80 in 1967)	38.5
	Troy	1957	0.0	7
		1958	0.0	7
	Weaver	1950	30	100
		1954	less than 30	mostly
		1969	0.0	23
	Wogamon	1955	0.0	0
White	Belmont	1956	100	100
		1960	100	100
	Meadowdale H.S.	1960	100	100
		1967	99.1	94.1
	Patterson Co-op	1954	100	100
		1967	87.2	96.5
	Stivers	1966	99	95
	Wilbur Wright	1953	mostly	100
		1964	96.7	94
	Orville Wright	1952	100	100
		1955	100	100
		1966	100	100
	Allen Prim	1969	100	90
	Belle Haven	1954	100	100
		1957	100	100
		1958	100	100
		1964	100	100
	Brown	1950	100	100
		1953	100	100
	Cleveland	1956	100	100
		1967	100	100
	Eastmont	1955	100	100
		1958	100	100
		1967	100	97
	Fairview	1950	100	100
		1955	100	100
		1966	100	100
	Fort McKinley	1955	100	100
	Franklin	1961	100	100
		1967	100	97
	Gettysburg	1950	100	100
		1952	100	100
	Grant	1952	100	100
		1955	100	100
	Huffman	1967	98.5	93
	Kemp	1951	100	100
		1954	100	100
		1957	100	100
	Lewton	1951	100	100
		1954	100	100
		1957	100	100

School	Year Opened	AT OPENING % White Pupils	AT OPENING % White Faculty
Lincoln	1957	100	100
	1964	100	98.3
Loos	1954	100	100
	1967	98.8	96
Horace Mann	1954	100	100
	1957	100	100
Meadowdale El	1957	100	100
	1962	100	100
	1966	100	100
Patterson	1954	100	100
	1970	100	100
Ruskin	1955	100	100
	1966	(100 in 1967)	(100 in 1967)
Shiloh	1953	100	100
	1960	100	100
	1969	94	96
Shoup Mill	1958	100	100
Valerie	1966	100	100
Webster	1968	100	100

* The schools and classrooms which opened as racially identifiable black schools contain pupil populations over 95% black in the 1971-1972 school year. The schools and classrooms which opened as racially identifiable white schools contain 90% or more white pupil populations in 1971-1972 school year with the exception of Patterson Co-op (69.0% white), Stivers (87.7% white), Valerie (86.5% white), Gettysburg (85.5% white), and Belle Haven (89.7% white).

Source: D.P.S. Personnel Reports; Compilation of the D.P.S. Division of Research and D.P.S. Office of Equal Educational Opportunity; and the D.P.S. Building Schedule.

PLAINTIFFS' EXHIBIT 5A

1963-64 New Black Teacher Employments/Placements

46
43 Full-time assignments
40 To schools with pupils racial composition 80% or more black

1964-65 New Black Teacher Employments/Placements

73
68 Full-time assignments
57 To schools with pupil racial composition 80% or more black

1968-69 Assignments of New and Transfer Teachers

	Schools with Predominantly White Enrollment	Schools with Predominantly Negro Enrollment	Total
Negro Teachers	40	95	135
White Teachers	223	64	287

Source: D.P.S. Personnel Reports; D.P.S. Superintendent's Compilations

PLAINTIFFS' EXHIBIT 5D

RACIAL PATTERN IN THE ALLOCATION OF PUPILS AND FACULTY

Year	No. Black Teachers	No. White Teachers	Faculty Allocated To Pupil Populations 90% + Black	Faculty Allocated To Pupil Populations 90% + White
1950-51	---- ----	---- ----	All Black No White	No Black All White
1963-64	415	1616	304 (74.5%) 151 (7.3%)	51 (12.7%) 1280 (79.2%)
1968-69	746	1847	633 (84.8%) 172 (9.3%)	172 (9.3%) 1299 (70.3%)

Source: D.P.S. Personnel Reports and Division of Research Compilations, Ohio Civil Rights Survey.

PLAINTIFFS' EXHIBIT 7

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF DAYTON, OHIO

WEDNESDAY – DECEMBER 8, 1971 – REGULAR MEETING

The following Resolution was introduced for adoption by Mr. Lucas, seconded by Mrs. Sterzer:

RESOLUTION SEEKING JOINT ACTION TO END SEGREGATION IN EDUCATION, HOUSING AND EMPLOYMENT IN THE METROPOLITAN DAYTON AREA

WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupils assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Day-

ton metropolitan area and other parts of Ohio; and the actions in inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

2. That this Board recognizes that past actions or inactions of the Board of Education and residential racial segregation are interdependent phenomena.

3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society.

5. That this Board views the racial and ethnic mix of the Dayton City School District and of the metropolitan area as assets; that this population, if reflected in each school, could itself contribute to people's learning from each other; and that, as a whole, the metropolitan area represents a nearly ideal cross section of the nation that could permit schools here to become a model of American democracy in action.

6. That this Board hereby invites and urges agencies of the federal, state, and local governments and organizations

of religious, business, labor, education, communications, civic service, and real estate to assist the Board in desegregation of Dayton schools and to pledge publicly their accelerated efforts to bring about desegregation in housing, education and employment throughout the Dayton metropolitan area.

7. That the Clerk of The Board be and hereby is directed to forward a true copy of this resolution to the following:

Governor of the State of Ohio
President of the State Board of Education
Speaker of the Ohio House of Representatives
President of the Ohio Senate
Montgomery County Members of the Ohio General Assembly and United States Congress
Montgomery County Commissioners
Dayton City Commissioners
Montgomery County Council of Governments
City Plan Board
Miami Valley Regional Planning Commission
Miami Valley Regional Transit Authority
Metropolitan Housing Authority

Apartment Owners Association
Area Progress Council
Assembly of Area Councils
Chairmen of Democratic and Republican Organizations
Community Affairs Committee
Congress of Representatives East Dayton Organizations
Dayton Advisory Council on Education
Dayton Area Board of Realtors
Dayton Area Chamber of Commerce
Dayton Area Junior Chamber of Commerce
Dayton Building Trades Council
Dayton Classroom Teachers Association

Dayton-Miami Valley AFL-CIO
Dayton Model Cities Planning Council, Inc.
Dayton Public Service Union
Dayton Urban League
Deans of Area Colleges of Education
Elementary Principals Association
Metropolitan Churches United
Miami Valley Consortium of Colleges and Universities
Montgomery County Community Action Agency
Montgomery County Council of PTAs
National Association for the Advancement of Colored People
Ohio Association of Public School Employees
Presidents Club
Secondary Principals Association
Southern Christian Leadership Conference

After introduction of the motion to adopt the Resolution, Mrs. Groff asked that the following statement be made a part of the Minutes:

"I feel that this resolution is beyond the jurisdiction of this Board because first of all it doesn't require a vote because it is in violation of this Board's present policy. Even though you sent out and stated that the policy we have on record referred to the election back in November 10, 1970, I would like to refute that because I have here a newspaper clipping quoting Dr. Carrell. It was when we were about to submit the policy on middle schools. On the question of middle schools, and I'd like to quote, "It has been alledged that there are 9 middle schools already chosen but not revealed by the Board. That they will be implemented over a weekend." Answer: "On both counts the answer is "no". First, I have not heard of any such proposal for 9 middle schools. I have no idea whether there will be 9 or 3 or 18. There is no proposal before the Board at this moment for any one of those figures. The Board adopted a policy some time ago

which said there would be 4 month's notice given to the public prior to the adoption of any significant policy decision. I feel that we still feel bound by that." Now, this is a new policy decision. This is the first time it has been before the Board. I feel this resolution is out of order. It's invalid because you are violating the Board's policy."

Upon completion of further discussion, it was moved by Mr. Ridenour, seconded by Mr. Hart, that action on the Resolution be tabled until the next regular meeting. Roll Call on the motion to table:

YEAS: Groff, Hart, Ridenour – 3
NAYS: Carrell, Seaman, Sterzer, and Lucas – 4

The motion to table was declared defeated.

Roll Call on original motion to adopt the Resolution:

YEAS: Carrell, Hart, Seaman, Sterzer, and Lucas – 5
NAYS: Groff, Ridenour – 2

The Resolution was declared adopted.

———

The following Resolution was introduced for adoption by Mr. Lucas, seconded by Mrs. Sterzer:

RESOLUTION ASKING FOR STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS

WHEREAS, The Committee of 75 has recommended school integration on a metropolitan basis, and

WHEREAS, the State of Ohio has responsibility and authority for the operation of public schools, and the State Board of Education has the duty to administer the laws relating generally to the operation of the schools, and

WHEREAS, the Ohio Attorney General has ruled that the State Board of Education has the authority to restrict fund-

ing in any school district in which said Board finds as a matter of fact that racial segregation exists,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby petitions the State of Ohio and the State Board of Education (a) to obtain from Ohio Civil Rights Commission, U. S. Office of Education and such other sources as it may deem useful, data on racial isolation of faculty, staffs and pupils within and among the several school districts as presently constituted in the metropolitan Dayton area; (b) to develop guidelines and criteria as may be necessary to assure an educationally and socially viable mix of pupils, within the socio-economic characteristics of the metropolitan area as a whole; (c) to require said districts to cooperate in preparing and implementing a plan for assignment of faculty, staffs and pupils in accordance with said guidelines and criteria, and (d) to assure adequate funding from state and district sources to continue the operation of the schools and the implementation of said plans throughout the period of transition and thereafter.
2. That said plans be developed by September 1, 1972 and fully implemented not later than September 1, 1973.
3. That the Clerk of the Board forward a true copy of this resolution to the Governor of the State of Ohio, the Speaker of the House of Representatives, the President of the Ohio Senate and the President of the State Board of Education.

After introduction of the motion to adopt the Resolution, Mrs. Groff asked that the following statement be made a part of the Minutes:

"Yes, I object to this resolution because it is also invalid and in violation of this Board's policy too. Also this is the

responsibility of the State Board of Education and the State Legislature and not this Board of Education to make these kinds of laws."

It was moved by Mr. Rinenour, seconded by Mr. Hart, that action on the Resolution be tabled. Roll Call on the motion to table:

YEAS; Groff, Hart, and Ridenour – 3
NAYS: Carrell, Seaman, Sterzer, and Lucas – 4

The motion to table was declared defeated.

Roll Call on original motion to adopt the Resolution:

YEAS: Carrell, Hart, Seaman, Sterzer, and Lucas – 5
NAYS: Groff and Ridenour – 2

The Resolution was declared adopted.

[PROPOSAL TO SUBMIT RESOUTION ASKING FOR STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS TO THE STATE BOARD OF EDUCATION]

It was moved by Mrs. Sterzer, seconded by Mr. Seaman, that the Resolution asking for State Assistance to Desegregate Public Schools be carried by a committee representative of the school district to the next State Board of Education meeting and presented at their public hearing. Roll Call:

YEAS: Carrell, Hart, Seaman, Sterzer, and Lucas – 5
NAYS: Groff and Ridenour – 2

The motion was declared approved.

Plaintiffs' Exhibit 7

The following Resolution was introduced for adoption by Mr. Lucas, seconded by Mrs. Sterzer:

RESOLUTION ORDERING THE RACIAL AND ECONOMIC INTEGRATION OF PUPILS IN THE DAYTON PUBLIC SCHOOLS

WHEREAS, the Board of Education of the Dayton City School District recognizes a moral and legal duty to provide quality non-segregated education for all students in the district, and,

WHEREAS, integrated education is vital to the achievement of quality education for all pupils, black and white, rich and poor, and,

WHEREAS, the Fourteenth amendment to the United States Constitution and the mandate of the United States Supreme Court in Brown v. Board of Education decision and subsequent court decisions place an affirmative duty to disestablish the segregated attendance patterns which result in whole or in part from its actions and inactions in order to equalize educational opportunity, and,

WHEREAS, segregated educational opportunity and unequal educational opportunities for minority and poor students now exist in the Dayton Public Schools, and

WHEREAS, this inequality exists as a result of the acts and omissions of this Board and preceding Boards in their decisions concerning the site selection of school buildings, size of school buildings, changes and adoption of school attendance boundaries, pupil assignment practices, faculty and staff hiring and assignment practices and,

WHEREAS, this Board has requested and received reports of findings and recommendations from the State Department of Education and the Committee of 75,

Plaintiffs' Exhibit 7

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton that it is the policy of this Board that each school shall enroll pupils in a manner which substantially reflects the racial and economic characteristics of the district as a whole. The Board recognizes that implementation of this policy requires departure from past practices and requires special planning to assure a smooth transition. The Board therefore directs:

1. That the superintendent in consultation with professional staff and the representatives of employee organizations, design and implement a mandatory program of in-service education involving all staff members to prepare staff for changes in enrollments and to develop an individualized, multi-ethnic curriculum in each school.

2. That Dayton Advisory Council on Education be requested to organize a Community Involvement Advisory Committee and a Lay Citizens Financial Review Committee to advise the superintendent during the course of planning and implementing integration programs, as recommended by the Committee of 75.

3. That the superintendent be and hereby is directed to develop and implement plans for the racial and economic integration of pupils using the following guidelines and criteria:

   a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

   b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

   c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

e. Desegregation is to be completed by September, 1972.

f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criteria in c. above.

g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy.

PLAINTIFFS' EXHIBIT 8

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF DAYTON, OHIO

———

MONDAY – JANUARY 3, 1972 –
REGULAR MEETING

[RESOLUTION FOR AUTHORIZATION TO ADVERTISE FOR BIDS FOR PURCHASE OF SCHOOL BUSSES]

It was moved by Mr. Lucas, seconded by Mr. Lawson, that the following Resolution be adopted:

RESOLUTION ON SCHOOL BUS PURCHASING

WHEREAS, it has been determined that it is necessary to purchase one hundred and thirty, sixty-six passenger conventional or seventy-three passenger transit type buses, and,

WHEREAS, it is recommended that school buses be purchased and operated by the Board of Education, and,

WHEREAS, plans and specifications have been prepared by the Business Department,

NOW, THEREFORE, BE IT RESOLVED that the Clerk-Treasurer be and hereby is authorized to advertise for bids to be opened and read publicly in accordance with the provisions of Section 3313.46, Revised Code and that they be tabulated and reported to the Board at its earliest meeting after the bid opening.

YEAS: Lawson, Lucas, and Sterzer – 3
NAYS: Goodwin, Groff, Ridenour, and Hart – 4

The Resolution was declared defeated.

———

[RESOLUTION REGARDING PREPARATION OF BUDGET]

It was moved by Mr. Goodwin, seconded by Mr. Ridenour, that in the preparation of the 1972 budget the Superintendent be directed by the Board to maintain line items in the same categories in order to give Board members direct comparison across the line, to maintain cost comparison from one year to another and with monthly reports to be made to the Board.

YEAS: Goodwin, Groff, Lawson, Ridenour, and Hart – 5
NAYS: Lucas – 1
ABSTENTION: Sterzer – 1

The motion was declared approved.

———

[RESOLUTION FOR AUDIT]

It was moved by Mr. Goodwin, seconded by Mrs. Groff, that the Clerk-Treasurer be authorized to seek bids immediateately for a complete audit of 1970 and 1971 income and expenditures of the Board of Education in each category relative to all items listed in the Appropriation Budget and amended budgets with the audit to be made according to the use of State and Federal guidelines.

Mr. Lucas stated that boards of education do not have statutory authority to employ independent auditors to audit their records.

The chair then requested that the motion be tabled and a ruling sought as to whether or not the action indicated in the motion could be legally carried out.

It was moved by Mr. Lucas, seconded by Mr. Lawson, that the matter be tabled in accordance with the request of President Hart.

YEAS: Goodwin, Groff, Lawson, Lucas, Ridenour, Stetzer, and Hart – 7

NAYS: None

The motion to table was declared approved.

———

[CONSIDERATION OF THREE RESOLUTIONS DRAFTED DECEMBER 8, 1971]

Mrs. Groff asked the Chair whether the motion to reconsider the three resolutions on integration could be brought up at this time. President Hart called up the motion on the vote to reconsider at the request of Mrs. Groff and then read the following statement:

"On December 8, 1971, there was presented to this board three resolutions by Mr. Lucas, to-wit:

1. Resolution Seeking Joint Action to End Segregation in Education, Housing and Employment in the Metropolitan Dayton Area.
2. Resolution Asking For State Assistance to Desegregate Public Schools.
3. Resolution Ordering The Racial and Economic Integration of Pupils in The Dayton Public Schools.

The motion was seconded and passed.

Thereafter Mr. Hart moved, seconded by Mrs. Groff, that the above resolutions offered by Mr. Lucas, (titles being read) be taken up at the next meeting, that the questions be reconsidered and entered upon the minutes of the December 8, 1971, meeting.

Mr. Lucas ruled that the motion to reconsider was out of order.

Later Mr. Lucas, publicly, withdrew this ruling. The chair concurs that Mr. Lucas' ruling was in itself out of order for the reason that – whether a point of order is raised or not, all actions in violation of the by-laws are null and void automatically. Our by-laws provides for reconsideration and for the use of Robert's Rules of Order which also provides for motions to reconsider and enter.

The December 8, 1971 meeting then by unanimous vote was recessed to a definite date and never reconvened.

On December 30, 1971, an assemblage of various board members was held and a purported vote taken on the reconsideration heretofore entered on the minutes of the December 8, 1971 meeting. This was NOT convened as a special meeting as the notice did not indicate that the call was for a special meeting and did not list reconsideration or any agenda which under our rules of order must be done. Secondly, it was not signed by members calling the meeting.

Thirdly, the notice merely recited action taken at a previous assemblage of December 16, 1971.

We must not examine the proceedings of the December 16, 1971, meeting. The December 16, 1971 meeting was a special meeting called at the instance and under the signature of two board members. Under the statutes and under our own rules and regulations it must be served on each member at least two days prior to the date of the called meeting. One member, Mr. Hart, did not receive the notice within the required time. A copy of that notice and the envelope within which it was sent shows that the special delivery department of the posal service did not receive this notice until 15 December 1971, which made it physically impossible to serve the notice at least two days prior to the meeting of December 16, 1971.

The attorney general has held and courts have decided that the proceedings of a school board are invalid where the required notice is not given and the member not receiving notice is absent.

The chair therefore rules that:

1. The ruling of Mr. Lucas ruling the motion to reconsider and enter made at the December 8, 1971 meeting to be out of order was itself out of order.
2. The proceedings of the December 16, 1971 meeting are invalid and this includes all votes taken at this meeting including the vote to reconsider and the vote setting a regular meeting for December 30, 1971.
3. That you cannot set a legal meeting at an illegal meeting.
4. Since the last legal meeting was recessed until January 3, 1972 the only meeting that could be called after recess was a special meeting.
5. That the December 30, 1971 meeting was invalid since it was convened as a regular meeting at a special meeting which itself was invalid and no call of a special meeting was made in accordance with the statutes governing special meetings.

6. That proceedings and votes taken at the December 30, 1971 meeting are invalid because of the illegality of the December 30, 1971 meeting.
7. That the Clerk of this board should confer with the president of this board to determine which actions this board would deem it necessary to confirm or ratify.
8. That the motion to reconsider, having never been acted upon, is now before this board under the category of new business and the question to reconsider may now be called up."

I call up the motion on the vote to reconsider the three resolutions which has been pending before this Board since the December 8, 1971 Regular Board Meeting."

Mr. Lucas asked that the record show that the action of the Chair at the January 3, 1972 meeting is invalid because the Board that dealt with this matter as a parliamentary procedure had adjourned sine die and this Board has no jurisdiction whatsoever.

It was moved by Mrs. Groff, seconded by Mr. Ridenour, that the motion to reconsider the three resolutions of December 8, 1971 on integration be brought before the Board for vote.

YEAS: Goodwin, Groff, Ridenour, and Hart – 4

NAYS: Lucas – 1

PASS: Lawson and Sterzer – 2

The motion to reconsider the three resolutions was declared approved.

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[RECONSIDERATION OF RESOLUTION SEEKING JOINT ACTION TO END SEGREGATION IN EDUCATION, HOUSING AND EMPLOYMENT IN THE METROPOLITAN DAYTON AREA]

The Clerk read the Resolution at the request of the Chair:

WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Dayton metropolitan area and other parts of Ohio; and the actions and inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

2. That this Board recognizes that past actions or inactions of the Board of Education and residential racial segregation are interdependent phenomena.

3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by

the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society.

5. That this Board views the racial and ethnic mix of the Dayton City School District and of the metropolitan area as assets; that this population, if reflected in each school, could itself contribute to people's learning from each other; and that, as a whole, the metropolitan area represents a nearly ideal cross section of the nation that could permit schools here to become a model of American democracy in action.

6. That this Board hereby invites and urges agencies of the federal, state, and local governments and organizations of religious, business, labor, education, communications, civic service, and real estate to assist the Board in desegregation of Dayton schools and to pledge publicly their accelerated efforts to bring about desegregation in housing, education and employment throughout the Dayton metropolitan area.

7. The the Clerk of the Board be and hereby is directed to forward a true copy of this resolution to the following:

   Area Board of Education Presidents
   Governor of the State of Ohio

President of the State Board of Education
Speaker of the Ohio House of Representatives
President of the Ohio Senate
Montgomery County Members of the Ohio General Assembly and United States Congress
Montgomery County Commissioners
Dayton City Commissioners
Montgomery County Council of Governments
City Plan Board
Miami Valley Regional Planning Commission
Miami Valley Regional Transit Authority
Metropolitan Housing Authority
Apartment Owners Association
Area Progress Council
Assembly of Area Councils
Chairmen of Democratic and Republican Organizations
Community Affairs Committee
Congress of Representative East Dayton Organizations
Dayton Advisory Council on Education
Dayton Area Board of Realtors
Dayton Area Chamber of Commerce
Dayton Area Junior Chamber of Commerce
Dayton Building Trades Council
Dayton Classroom Teachers Association
Dayton-Miami Valley AFL-CIO
Dayton Model Cities Planning Council, Inc.
Dayton Public Service Union
Dayton Urban League
Deans of Area Colleges of Education
Elementary Principals Association
Metropolitan Churches United
Miami Valley Consortium of Colleges and Universities
Montgomery County Community Action Agency

Montgomery County Council of PTAs
National Association for the Advancement of Colored People
Ohio Association of Public School Employees
Presidents Club
Secondary Principals Association
Southern Christian Leadership Conference
Jewish Community Council

Prior to voting on the Resolution the Chair announced that a "Yes" vote would support the Resolution and a "Nay" vote would be one to defeat the Resolution.

YEAS: Lawson, Lucas, and Sterzer – 3
NAYS: Goodwin, Groff, Ridenour, and Hart – 4

The Resolution was declared defeated.

Mr. Lucas left the meeting at this point.

[RECONSIDERATION OF RESOLUTION ASKING STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS]

The Clerk read the Resolution at the request of the Chair:

RESOLUTION ASKING FOR STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS

WHEREAS, The Committee of 75 has recommended school integration on a metropolitan basis, and

WHEREAS, the State of Ohio has responsibility and authority for the operation of public schools, and the State Board of Education has the duty to administer the laws relating generally to the operation of the schools, and

WHEREAS, the Ohio Attorney General has ruled that the State Board of Education has the authority to restrict funding in any school district in which said Board finds as a matter of fact that racial segregation exists,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby petitions the State of Ohio and the State Board of Education (a) to obtain from Ohio Civil Rights Commission, U. S. Office of Education and such other sources as it may deem useful, data on racial isolation of faculty, staffs and pupils within and among the several school districts as presently constituted in the metropolitan Dayton area; (b) to develop guidelines and criteria as may be necessary to assure an educationally and socially viable mix of pupils, within the socio-economic characteristics of the metropolitan area as a whole; (c) to require said districts to cooperate in preparing and implementing a plan for assignment of faculty, staffs and pupils in accordance with said guidelines and criteria, and (d) to assure adequate funding from state and district sources to continue the operation of the schools and the implementation of said plans throughout the period of transition and thereafter.
2. That said plans be developed by September 1, 1972 and fully implemented no later than September 1, 1973.
3. That the Clerk of the Board forward a true copy of this resolution to the Governor of the State of Ohio, the Speaker of the House of Representatives, the President of the Ohio Senate and the President of the State Board of Education.

Prior to voting on the Resolution the Chair announced that a "Yes" vote would support the Resolution and a "No" vote would be one to defeat the Resolution.

YEAS: Lawson and Sterzer
NAYS: Goodwin, Groff, Ridenour, and Hart

The Resolution was declared defeated.

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[RECONSIDERATION OF RESOLUTION ORDERING THE RACIAL AND ECONOMIC INTEGRATION OF PUPILS IN THE DAYTON PUBLIC SCHOOLS]

The Clerk read the Resolution at the request of the Chair:

RESOLUTION ORDERING THE RACIAL AND ECONOMIC INTEGRATION OF PUPILS IN THE DAYTON PUBLIC SCHOOLS

WHEREAS, the Board of Education of the Dayton City School District recognizes a moral and legal duty to provide quality non-segregated education for all students in the district, and,

WHEREAS, integrated education is vital to the achievement of quality education for all pupils, black and white, rich and poor, and,

WHEREAS, the Fourteenth amendment to the United States Constitution and the mandate of the United States Supreme Court in Brown v. Board of Education decision and subsequent court decisions place an affirmative duty to disestablish the segregated attendance patterns which result in whole or in part from its actions and inactions in order to equalize educational opportunity, and,

WHEREAS, segregated educational opportunity and unequal educational opportunities for minority and poor students now exist in the Dayton Public Schools, and

WHEREAS, this inequality exists as a result of the acts and omissions of this Board and preceding Boards in their decisions concerning the site selection of school buildings, size of school buildings, changes and adoption of school attendance boundaries, pupil assignment practices, faculty and staff hiring and assignment practices and,

WHEREAS, this Board has requested and received reports of findings and recommendations from the State Department of Education and the Committee of 75,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton that it is the policy of this Board that each school shall enroll pupils in a manner which substantially reflects the racial and economic characteristics of the district as a whole. The Board recognizes that implementation of this policy requires departure from past practices and requires special planning to assure a smooth transition. The Board therefore directs:

1. That the superintendent in consultation with professional staff and the representatives of employee organizations, design and implement a mandatory program of in-service education involving all staff members to prepare staff for changes in enrollments and to develop an individualized, multi-ethnic curriculum in each school.

2. That Dayton Advisory Council on Education be requested to organize a Community Involvement Advisory Committee and a Lay Citizens Financial Review Committee to advice the superintendent during the course of planning and implementing integration programs, as recommended by the Committee of 75.

3. That the superintendent be and hereby is directed to develop and implement plans for the racial and economic integration of pupils using the following guidelines and criteria:

   a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

   b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

   c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

   d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

   e. Desegregation is to be completed by September, 1972.

   f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criteria in c. above.

   g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy.

4. That to the maximum feasible extent consistent with this policy statement, recommendations of the Committee of 75, are hereby adopted and may be used in planning and implementing school integration.

5. That the superintendent report on progress and problems concerning implementation of this policy at least every sixty days and that a program for continuous evaluation throughout the phases of implementation be developed by July 31, 1972.

6. That the superintendent prepare applications for supplementary financial assistance from state, federal and other sources that may become available to improve the quality of education and achieve the goals of the Committee of 75 report.

Prior to voting on the Resolution the Chair announced that a "Yes" vote would support the Resolution and a "No" vote would be one to defeat the Resolution.

YEAS: Lawson and Sterzer – 2
NAYS: Goodwin, Groff, Ridenour, and Hart – 4

The Resolution was declared defeated.

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Plaintiffs' Exhibit 8

[STATEMENT AND RULING OF THE CHAIR]

At this time President Hart made the following statement and ruling:

"Gentlemen, since this board has voted to reconsider these questions and has defeated them, the Chair now rules that under the form to reconsider and enter upon the minutes, that this is all that must be done to stop execution upon motions or actions of this Board because that to permit otherwise would deprive the board of its right to reconsider.

Since it is possible that there may have been a premature execution of these questions, the chair further rules:

1. That the superintendent under his signature communicate with all persons and agencies named in said motions advising them of the premature execution thereof, requesting a withdrawal of said premature communications and countermanding the communications that were premature where the premature communication cannot be withdrawn; and that communications upon said motions that were made prior to this date are premature and invalid."

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Mr. Lucas returned to the meeting at this point.

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[STATEMENT OF MRS. GROFF]

The Chair recognized Mrs. Groff who made the following statement:

Mr. President, Members of the Board, and Citizens:

Quoting from THE CREATIVE SOCIETY by Ronald Reagan, "We have the privilege of living on the only island of freedom that is left in the whole world." There is no other place in the world to go. We stand together and defend freedom here or it is gone. We must work together and take a

Plaintiffs' Exhibit 8

stand. If we fail, I think we face telling our children and our grandchildren what it was we found more precious, or more important than freedom.

"Freedom is a fragile thing and is never more than one generation away from extinction. It comes only once to a people. Those who have had it and lost it have never known it again."

The Dayton Schools are the people's business, and every man, woman and child becomes a shareholder with the first penny of tax paid. The most meaningful words of the Constitution are the first three, "We the people."

Therefore, the time has come for the Board to recognize that the schools belong to the people and that the people have a right to know all the facts about their schools.

The time has come for the Board to decide whether we can afford everything we think of simply because we think of it. The time has come to run a check to see if all the services we have taken away from the people or the innovations we have provided are just goodies dreamed up for their supposed betterment. The time has come to balance outgo to income, instead of always doing it the other way around.

What we need is a system of an objective evaluation before changes are implemented. The people should have the opportunity to give their opinion on supposed changes and the Board act on the decisions of the people.

Supporting and implementing the basic principles that have made America great is not turning back the clock but it is taking the dream that has made this country progress, updating it, and making it practical for the 20th century. A High Quality Education which will insure that every child in the Dayton School System can reach his full potential so that he can become a responsible contributing member of society is the goal of this Board of Education.

With these thoughts in mind I would like to present the following three resolutions."

The following Resolution was introduced by Mrs. Groff, seconded by Mr. Ridenour:

RESOLUTION ORDERING DEVELOPMENT OF PLANS THAT ARE WITHIN THE FINANCIAL ABILITY OF THE CITY SCHOOL DISTRICT OF DAYTON FOR IMPROVEMENT OF QUALITY OF EDUCATION.

WHEREAS, the present enrollment patterns of the Dayton Public Schools are not related to the policies or decisions of the Board of Education;

WHEREAS, the racial and economic imbalance that exists in the Dayton Public Schools is not a result of any act of discrimination on the part of the Dayton Board of Education;

WHEREAS, the Constitution of the United States does not require a Board of Education to balance racial concentrations in schools where such racial concentrations are not the result of any act of the Board of Education;

WHEREAS, the Dayton City Schools have been found to be in compliance with HEW rules and regulations as evidenced by the statement of Mr. James Mancini, a compliance review attorney in the Civil Rights Division of HEW;

WHEREAS, no massive movement of pupils back and forth across the City or County could be accomplished without an expenditure of thousands and thousands of dollars;

WHEREAS, the reasons given by the administrators of the Dayton School System for the 10.5 mill additional levy did not include an expenditure for bussing and for other transportation of pupils for the purpose of eliminating economic and/or racial segregation of pupils, nor do the additional State appropriations require this;

WHEREAS, this Board of Education has consistently supported the concept of neighborhood schools;

WHEREAS, the Freedom of Enrollment policy of the Dayton City School District has been considered a successful venture;

WHEREAS, this Board of Education is concerned about all the children of the Dayton City School District and is consistently searching for ways and means to improve the quality of education offered to them and;

WHEREAS, this Board of Education has adopted various plans and approaches toward improvement of the quality of the education offered to the children of Dayton;

NOW, THEREFORE, BE IT RESOLVED, by the Board of Education of the City School District of Dayton that the Superintendent and his staff submit to this Board by the end of the 1971-72 school term a feasibility report and plan that is within the financial ability of the City School District of Dayton, Ohio, providing for improvement in the quality of education offered at each of the schools within this district.

It was moved by Mr. Lucas, seconded by Mrs. Sterzer, that action on the Resolution be tabled.

Roll Call on the Motion to Table:

YEAS: Lawson, Lucas, and Sterzer – 3
NAYS: Goodwin, Groff, Ridenour, and Hart – 4

The motion to table action on the Resolution was declared defeated.

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Roll Call on the Resolution:

YEAS: Goodwin, Groff, Ridenour, and Hart – 4
NAYS: Lawson, Lucas, and Sterzer – 3

The Resolution was declared adopted.

The following Resolution was introduced by Mrs. Groff, seconded by Mr. Goodwin:

RESOLUTION ORDERING DEVELOPMENT OF FEASIBILITY REPORTS AND PLANS FOR PROVIDING FREE TRANSPORTATION OF STUDENTS PARTICIPATING IN THE FREEDOM OF ENROLLMENT PROGRAM IN THE DAYTON PUBLIC SCHOOLS

WHEREAS, the present enrollment patterns of the Dayton Public Schools are not related to the policies or decisions of the Board of Education;

WHEREAS, the racial and economic imbalance that exists in the Dayton Public Schools is not a result of any act of discrimination on the part of the Dayton Board of Education;

WHEREAS, the Constitution of the United States does not require a Board of Education to balance racial concentrations in schools where such racial concentrations are not the result of any act of the Board of Education;

WHEREAS, the Dayton City Schools have been found to be in compliance with HEW rules and regulations as evidenced by the statement of Mrs. James Mancini, a compliance review attorney in the Civil Rights Division of HEW;

WHEREAS, no massive movement of pupils back and forth across the City or County could be accomplished without an expenditure of thousands and thousands of dollars;

WHEREAS, the reasons given by the administrators of the Dayton School System for the 10.5 mill additional levy did not include an expenditure for bussing and for other transportation of pupils for the purpose of eliminating economic and/or racial segregation of pupils, nor do the additional State appropriations require this;

WHEREAS, this Board of Education has consistently supported the concept of neighborhood schools;

WHEREAS, the Freedom of Enrollment policy of the Dayton School District has been considered a successful venture;

WHEREAS, this Board of Education is concerned about all the children of the Dayton City School District and is consistently searching for ways and means to improve the quality of education offered to them and;

WHEREAS, this Board of Education has adopted various plans and approaches toward improvement of the quality of the education offered to the children of Dayton;

NOW, THEREFORE, BE IT RESOLVED, by the Board of Education of the City School District of Dayton that the Freedom of Enrollment policy of the Dayton Public Schools shall be continued with the exception that the Superintendent and his staff be, and hereby are, directed to develop and submit to this Board of Education before the start of the second semester of the 1971-72 school year a feasibility report and plan providing for the free transportation of the students participating in such program.

It was moved by Mr. Lucas, seconded by Mr. Lawson, that the action on the Resolution be tabled.

Roll Call on the Motion to Table:

YEAS: Lawson, Lucas, and Sterzer – 3
NAYS: Goodwin, Groff, Ridenour, and Hart – 4

The motion to table was declared defeated.

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Roll Call on the Resolution:

YEAS: Goodwin, Groff, Ridenour, and Hart – 4
NAYS: Lawson, Lucas, and Sterzer – 3

The Resolution was declared adopted.

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The following Resolution was introduced by Mrs. Groff, seconded by Mr. Goodwin.

RESOLUTION AUTHORIZING ARRANGEMENT OF STUDENT TRANSFERS BETWEEN DAYTON CITY SCHOOL DISTRICTS AND SCHOOL DISTRICTS WITHIN THE DAYTON METROPOLITAN AREA.

WHEREAS, the present enrollment patterns of the Dayton Public Schools are not related on the policies or decisions of the Board of Education;

WHEREAS, the racial and economic imbalance that exists in the Dayton Public Schools is not a result of any act of discrimination on the part of the Dayton Board of Education;

WHEREAS, the Constitution of the United States does not require a Board of Education to balance racial concentrations in schools where such racial concentrations are not the result of any act of the Board of Education;

WHEREAS, the Dayton City Schools have been found to be in compliance with HEW rules and regulations as evidenced by the statement of Mr. James Mancini, a compliance review attorney in the Civil Rights Division of HEW;

WHEREAS, no massive movement of pupils back and forth across the City or County could be accomplished without an expenditure of thousands and thousands of dollars;

WHEREAS, the reasons given by the administrators of the Dayton School System for the 10.5 mill additional levy did

not include an expenditure for bussing and for other transportation of pupils for the purpose of eliminating economic and/or racial segregation of pupils, nor do the additional State appropriations require this;

WHEREAS, this Board of Education has consistently supported the concept of neighborhood schools;

WHEREAS, the Freedom of Enrollment policy of the Dayton City School District has been considered a successful venture;

WHEREAS, this Board of Education is concerned about all the children of the Dayton City School District and is consistently searching for ways and means to improve the quality of education offered to them and;

WHEREAS, this Board of Education has adopted various plans and approaches toward improvement of the quality of the education offered to the children of Dayton;

NOW, THEREFORE, BE IT RESOLVED,

1. That with the concurrence of one or more of the school districts within the Dayton Metropolitan area and following the Freedom of Enrollment guidelines as amended of the Dayton City School District, the Superintendent is authorized to arrange for the payment of tuition for students requesting tuition-paid transfers to schools outside of the Dayton City School District providing, however, (a) that the transfers are arranged during the summer for the succeeding school year, (b) that the entire sum for all such tuition payments paid by the Dayton Board of Education shall not exceed the amount of tuition received by the Board from other school districts during the preceding calendar year and (c) that such transfer shall improve the racial balance of the public schools of the Dayton City School District. It is further suggested that this policy be implemented for 1972-73 school year.

2. That with the concurrence of one or more of the school districts within the Dayton metropolitan area and following the Freedom of Enrollment guidelines as amended of the Dayton City School District the Superintendent, upon mutual exchange of students or upon payment of tuition, is authorized to accept any student from an outlying school district within this District provided that the acceptance of such student at a school within this district shall improve the racial balance of such school.

It was moved by Mr. Lucas, seconded by Mr. Lawson, that action on the Resolution be tabled.

Roll Call on the Motion to Table:

YEAS: Lawson and Lucas – 2
NAYS: Goodwin, Groff, Ridenour, Sterzer, and Hart – 5

The motion to table was declared defeated.

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Roll Call on the Resolution:

YEAS: Goodwin, Groff, Ridenour, and Hart – 4
NAYS: Lawson and Lucas – 2
ABSTENTION: Sterzer – 1

Mrs. Sterzer indicated that she abstained from voting because she felt Mrs. Groff's resolution was not valid since it fell outside the jurisdiction of the Board.

The Resolution was declared adopted.

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[INSTRUCTIONS TO CLERK AND SUPERINTENDENT OF SCHOOLS]

The following motion was introduced by Mrs. Groff, seconded by Mr. Ridenour:

Mr. President:

I move that the Clerk of the Board be and hereby is directed to forward true copies of the three Resolutions to all persons and agencies who received copies of the tentative package of three Resolutions on Racial and Economic Rations, of the December 8, 1971 Board meeting. He shall inform them by separate letter of the three new resolutions, namely: on IMPROVEMENT OF QUALITY OF EDUCATION, on DEVELOPMENT OF PLANS FOR PROVIDING FREE TRANSPORTATION OF STUDENTS PARTICIPATING IN THE FREEDOM OF ENROLLMENT PROGRAM IN THE DAYTON PUBLIC SCHOOLS, and on AUTHORIZING ARRANGEMENT OF STUDENT TRANSFERS BETWEEN THE DAYTON SCHOOL DISTRICT AND SCHOOL DISTRICTS WITHIN THE DAYTON METROPOLITAN AREA. He shall inform them by separate letter of the three resolutions as adopted, and forward a copy of the letter to all members of the Board of Education.

I move also, that the Superintendent is directed to publish in the next issue of SCHOOL DAY Mrs. Groff's introductory remarks and the three resolutions as adopted by the Dayton Board of Education on January 3, 1972.

YEAS: Goodwin, Groff, Ridenour, and Lucas – 4
NAYS: Lawson, Lucas, and Sterzer – 3

The motion was declared approved.

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PLAINTIFFS' EXHIBIT 9

REPORT OF THE COMMITTEE OF 75

Advisory Committee To The Board of Education
To Reduce Racial Isolation and Improve
Educational Opportunities

Dayton Board of Education • 1971

THE COMMITTEE: ITS ORIGIN AND ACTIVITIES

The Committee of 75 was organized to advise the Dayton Board of Education how best to deal with racial and economic isolation in the public schools and improve the quality of education therein.

Origin

It originated in a resolution adopted by the Dayton Board of Education on April 29, 1971.

Resolution to Seek Assistance To Reduce Racial Isolation and Improve Educational Opportunities

WHEREAS, THE Dayton Board of Education recognizes that unequal educational opportunities for minority students now exist, and

WHEREAS, current resources available to the Board have been fully used to extend learning opportunities and are now stretched to their limit, and

WHEREAS, the Congress is considering the Emergency School Assistance Program that may supplement other funds for improving education and reducing racial and economic isolation,

NOW, THEREFORE BE IT RESOLVED that the superintendent of schools be authorized and directed to request the assistance of the State Department of Education, Office of Equal Educational Opportunities, to provide technical assistance for the development and submission to the Board of alternative plans for reducing racial and economic isolation of pupils and improving educational opportunities in the Dayton Public Schools and for developing proposals for outside funding to implement the same, subject to the approval of the Board.

BE IT FURTHER RESOLVED that the President of the Board, in consultation with the Board, appoint a broadly representative committee to evaluate and advise the Board on plans that are developed pursuant to this resolution; and to communicate with and seek the cooperation of civic, governmental, higher educational, religious, communications, labor, business and other segments of the community in the Dayton area regarding such plans.

Meeting first on August 30, 1971, at Frigidaire's Moraine plant auditorium on Springboro Pike, the committee received the following charge from Leo A. Lucas, Board President:

The Charge To
The Advisory Committee of the Board of Education
To Reduce Racial Isolation and Improve
Educational Opportunities

We, the members of the Dayton Board of Education, are deeply grateful for the presence of each of you here this evening. This is an historical event — one that is even more historical than the decision of the Dayton Board of Education of the 1930's to construct the original Dunbar High School.

We recognize, and the statistical data substantiates, the fact that unequal educational opportunities for the poor and black students now exist in the Dayton School District. The Board of Education has gone on record by setting quality integrated education as its goal. We have admitted that the district is guilty of procedures which have led to the racial isolation of school children.

It is this committee's responsibility to establish the evaluation elements to be applied to a developed plan or plans and advise the Dayton Board of Education accordingly. We do hope that you would set up guidelines and/or methods by which the community will become meaningfully involved.

You are an arm of the Dayton Board of Education with the task of supplying input to the Board. It remains the responsibility of the Board of Education to make official approval of your input. We feel very strongly that the establishment of this committee is not an attempt to abdicate its responsibility or delegate its authority, but rather an attempt to utilize the enrichment of citizen participation. It is hoped that the school councils, and organized groups of school-oriented citizens of the school district, will be an avenue you may use for additional participation.

If there be a fear that you are here to architect a master plan for "busing" – "t'ain't true." You are here in an attempt to supply your input of the ingredients for excellency to any plan that the administration and/or consultants may recommend. It is our sincere hope that when a plan is set for implementation, it should be that one or the one that embraces the wishes of the citizens of the Dayton School District and not one imposed by federal, state or court mandate.

Again, we are happy to have your view joined with us to place our input on what may be called The Dayton

Peoples Plan for the elimination of racial and economic isolation among the pupils of the Dayton School District.

Now acting by the authority invested in me as President of the Dayton Board of Education, I hereby officially appoint this committee and also name Dr. Irvin W. Batdorf as Chairman, and request that the termination date be set at December 1, 1971.

At this meeting an address was brought by Dr. William Self, Superintendent of the Charlotte-Mecklenburg school system in North Carolina, setting forth the process of integration accomplished there under order of the courts. Mrs. Virginia McNeal was elected vice-chairman of the Committee and Dr. Irvin W. Batdorf appointed as chairman. To address the problem of racial and economic isolation in each of the areas considered as integral to the operation of the public schools the committee was divided into nine subcommittees, the names of whose personnel appear on pages ii, iii, iv of this report. As listed there the committees include not only the original 75 members but also eleven students who were added to the committee later at the invitation of President Leo Lucas of the Board, in response to growing feeling that more student input was needed.

As a basic document to spark deliberations, each subcommittee member was given a copy of the publication, *Recommendations of the State Department of Education to the Dayton Board of Education* (2). This paper had been sent to each member of the Dayton Board of Education on June 7, 1971, and a copy is filed at the Board offices where the records of the committee of 75 are kept. Pages 13-16 of this paper list ten alternate responses to racial imbalance in the Dayton schools which the State Department did not consider adequate. On pages 16-30, the State Department recommended an eleventh proposal, on the basis of which the subcommittees began their deliberations. This latter recommendation included the substance of a paper by Dr. Charles Glatt

entitled "Parameters and the Future," which was printed in a report made to the Dayton Board of Education on December 15, 1970 bearing the title *School Integration* (14). This report also was made available to each member of the committee together with whatever materials each subcommittee found pertinent to its work. Members also profited much from the advice and wisdom of the schools central office staff through consultants assigned to each subcommittee.

PRIORITIES FOR THE PRESENT

What We Felt

Nothing can replace the experiences we had working with each other because the problem we had tackled forced us to put ourselves on the line. There was literally no place to hide. That's the way it is when you take integration seriously. And that's why something must be said about what we felt, painful and embarrassing as that is.

As we moved ahead, week after week and month after month, short as our time was together, the level of our encounters deepened until, at the end, without our knowing what lay below the surface or expecting what finally did happen, the depth of our relationship to each other suddenly stood revealed. We knew who we were once and for all, and each of us knew what he in particular had to do. I as a white man had to explain to other white men what it's like. The blacks had done their part long since and now it was my turn.

Through the words and the endless explanations came the fear of our black brethren that they were being sold down the river once again. For all of them – without exception – this was an old, old story. As one of them said, "Before I came to Ohio my oldest children were doing all right, but here in Dayton the younger ones are being crippled by segregation. I'm determined to change all that one way or another. We've suffered too long."

When we could not believe we were hearing rightly another black man pounded the nail one more time. "You know," he asked, "what the unemployment rate is for Dayton? – 6 per cent for everyone else and 20 per cent for ghetto blacks. You know how many more blacks you'll find at the Lebanon Correctional Facility? – 4 out of 5. And education – segregated education – is largely to blame."

So it was whitey's turn to be angy, frustrated, utterly down! "Suppose," said one, "we demand integration now. Our report won't have a chance! Better half a loaf than none at all. I can predict just what will happen. They'll never give us a hearing. Better to be Machiavelli than go tilting at windmills with Don Quixote."

So we were honest and shocked by turns until one white man said, "I'm not sure what will happen politically but so long as one black life is being snuffed out I'll go along with pressing for integration now. Hereafter I'm not going to simply listen to what everyone says, I'm ready to take a stand and be a leader, to do what I feel compelled to do and to say what I think ought to happen!"

So some of us switched roles and we all went off to lick our wounds and make what reaccommodations we could with ourselves – with "intellectual honesty" and "practicality" and "confrontation" and "gut feeling." But ever thereafter we all knew – both black and white – that we could not explain to our fellow Daytonians what integration and segregation are all about apart from this embarrassing reference to the deep valley we had walked together.

What We Must Do

Having been "through the mill" of confrontation with each other we accept these priorities for ourselves, and recommend their adoption by the Board and the citizenry of Dayton.

1. Segregated education, because it perpetuates and condones economic and racial isolation, is both illegal and inferior.

2. The school children of Dayton have suffered far too long under the crippling handicaps imposed by racial and economic isolation.
3. We must resolve now as a total community to end inferior segregated education once for all.
4. Time is running out. Unless we act now the divisions generated by segregation will destroy us. Unless we act now court orders may impose upon us what all of us will regret.
5. Initiative in the struggle against segregated education belongs to the Dayton Board of Education. We cannot wait for housing and job patterns to change while we defy the law of the land.
6. To lift the plague of segregated education in Dayton immediate appeal must be addressed to the school systems surrounding Dayton as well as to the appropriate state and national agencies involved.
7. Desegregation is not enough. To end racial and economic isolation we must not rest until we have achieved true integration, until the differing ethnic and racial groups among us are able to live side by side in mutual respect.
8. The personal cost of achieving such true integration will be high because to achieve such integration we must persist in dialogue until the differences that divide us have been resolved. We can no longer allow the fear of busing stifle such dialogue.
9. The financial cost of true integration will also be high. At least 1 per cent of the current budget, exclusive of federal and state grants, should be allocated to this sector.
10. Integrated quality education requires constant vigilance. We must not only develop support systems to undergird every group involved in the changes proposed but we must nurture these groups by continuing attention to curricula, buildings, and in-service training.

What Is Involved

To Impose Racial Isolation on Public Education is Illegal

The 14th amendment to the Constitution of the United States guarantees "equal protection" under law to every citizen, and the Supreme Court has interpreted this provision to mean that "separate educational facilities are inherently unequal" ("Brown v. Board of Education of Topeka" in *Race and Place A Legal History of the Neighborhood School*, by Meyer Weinberg pp. 4, 14, 31, 55, 76, 92, 96) (8). In this 1954 decision the Supreme Court said of black children:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Statement of The United States Commission on Civil Rights concerning the "Statement by the President on Elementary and Secondary School Desegregation", May 15, 1970, page 9 (7) is the source of the above statement.

Quality Education

In the spirit of this declaration and in the light of Title VI of the 1964 Civil Rights Act, which put the executive and legislative branches of government solidly behind the judiciary, we as a committee go one step further. *We believe that to impose racial and economic isolation on public education is not only illegal but detrimental to the quality of that education, for both white and black, for both advantaged and disadvantaged.*

Where such isolation breeds alienation, quality must suffer. The twin concerns that created our committee are inseparable.

Quality education cannot thrive where racial and economic isolation of whatever sort divides the children and citizens of one community from those of another.

The reason for this is plain. The quality of any educational system depends upon how well it prepares today's children for tomorrow's world. Tomorrow's world will be integrated and any child who has not been educationally prepared to deal with this world will be severely handicapped. He will receive a distorted view of a multi-racial society that will leave him incapable of dealing with the world as it is. Therefore we believe segregated education to be inherently inferior for ALL children, whether white or black, advantaged or disadvantaged.

Urgency of Action

Since it is clear that segregated education is both illegal and inferior, *it is also clear that the Dayton Board of Education must address itself to this problem since latest reports indicate that 75 per cent of our school children attend schools that are 90 per cent racially isolated.* The Board has already indicated its intention to do so through the resolution that created our committee of 75, and through many statements and actions leading up to that resolution of April 29, 1971.

We now recommend that the Board should not wait for this problem to be solved otherwise, as by a change in attitudes toward public housing patterns or by a non-compliance finding from H.E.W. Without waiting for other cities to take the lead, we recommend that our Board strengthen the impetus initiated by the appointment of our committee to solve this problem by all means within its power now.

The urgency of such action is made clear both by the poor record of Dayton in dealing with racial and economic isolation and by the court actions already taken to force school integration in cities other than Dayton.

Poor record. Where segregated education is concerned the City of Dayton has not been quick to act. In 1926 the State

Supreme Court acted to require the Dayton Ohio School Board to cease forcing Negro children to occupy one part of the school building with their own entrances and exists (*Race and Place,* page 38) (8). The situation was equally stringent in 1966 when the Mayor's Ad Hoc Riot Study devoted two pages of its *Preliminary Report* to a detailed description of the deterioration then being suffered by Dayton's west side schools in buildings, services, equipment, teaching and morale (pages 7-8). It is little wonder then that in 1967 the education task force committee, working under the Dayton Committee on Civil Rights in cooperation with the Ohio State Advisory Committee to the U. S. Commission on Civil Rights took as the focus of its concern "the education of the deprived ghettoized child" and particularly "his inability to learn the required and necessary tasks through the traditional methods practiced by our institutions" (page 2 of *Dayton's Call To Action. Recommendations for the Solution of Human Problems in the Community*) (16). While there was some progress then and the spirit of the community was aroused, our findings five years later indicate that there is still much to be done. One measure of this is a report issued just recently, (November 1971) by the Dayton Public Opinion Center, entitled *How Dayton Views the Public Schools* (4). The last paragraph on page 3 reads as follows:

> Racial conflicts in public schools have been the subject of much newspaper and television coverage in the past few years. Yet even with this type of adverse publicity, more people in the Dayton School District felt that school integration has improved relations between blacks and whites than believed that it has hindered them. A total of 48 per cent believed it was improved and 39 per cent felt that it has worked against interracial relations.

In this attitude there is perhaps some ray of hope. On the other hand the last part of this same paragraph continues:

> People were about evenly divided about whether school

> integration has improved the quality of education received by black students (45 per cent saying it has and 43 per cent saying it has not). Over one-half, however, felt that integration has not improved white students' education. Only 35 per cent responded that it has. (See Table 7).

One can see from this last quotation that we in Dayton still have a long way to go.

Integration in Other Cities

Beyond Dayton we may quote from a recent paper, referred to before in this report, *Statement of the United States Commission on Civil Rights* (7) concerning the "Statement by the President on Elementary and Secondary School Desegregation," issued on May 15, 1970. On page 3 we read:

> The school systems of New Rochelle, New York; South Holland, Illinois; Pasadena and Los Angeles, California; and Pontiac, Michigan, are among those which have been found by the court to have practiced deliberate school segregation in violation of the Fourteenth Amendment. There is no doubt that there are many more instances of school segregation resulting from conscious decisions of school officials than the relative handful that have come to the attention of the courts.

We may now add to this list the school situations in Detroit and Indianapolis. In the former case

> U. S. District Court Judge Stephan J. Roth declared that what appears to be *de facto* segregation in the Detroit School System is actually *de jure* and must be abolished. (*Time*, October 11, 1971, page 23).

In the Pontiac case the U. S. Supreme Court recently refused to "tamper with this city's court-ordered school busing program" (*Journal-Herald*, Wednesday, October 27, 1971).

We in Dayton should note that court orders have hit cities both larger than ours (Los Angeles and San Francisco) and smaller (New Rochelle, Pontiac, Pasadena and South Holland). We should also note from the report quoted that there may be other cities in non-compliance not yet confronted by the courts.

Of particular interest is a letter written by superintendent of schools for the San Francisco Unified School District, Dr. Thomas A. Shaheen, on the eve of the desegregation of that city's elementary schools. Although not under court order San Francisco met the same problems that face all segregated school systems in the process of complying with the law.

> These will not be easy days. What happens to us, not only in the next few weeks, but throughout the year, is tremendously important for San Francisco. I who have a deep commitment, as you know, to the value of desegregation do have many concerns, many uncertainties, about what the year holds. I am sure that there are many of you who have the same deep commitment to desegregation as I do.
>
> I am sure, also, that there are some of you who are still searching in your own minds the extent to which you have a commitment to desegregation.
>
> Yes, I know that some of you do not believe that desegregation is in the best interest of the schools of San Francisco, nor in the best interest of America. I feel that you have reached this position after very careful study of the issues, of the values, of this country, and your professional obligations to the children.
>
> I respect your convictions. Whatever your personal feelings, and mine, we have the obligation to show our students and our community the importance and value of compliance with the law. We can be models at this time of what it means to live in a democracy.
>
> The stakes and the issues which lie before us are high. It goes, I think, to the very heart of whether public school education can continue in this country of ours. . . . (11)

In the light of these facts, both at home and abroad, we believe that the Dayton School Board should address itself to the racial imbalance of segregated education not simply to insure respect for law and order and provide quality education but also to secure that justice and human understanding without which law and order are meaningless. We ask how we can urge law and order on our children and defy the supreme law of the land as interpreted by the Supreme Court. Not long ago the Kerner report was brought up to date by a Federal Commission appointed by President Nixon. It declared that the division of our nation into two armed camps, which was noted two years ago, still exists, only with greater impact now than then. In 1966 over 95 per cent of our nation's black people lived in the North and the majority of these in the city. Now that percentage is greater than ever with whites fleeing to the suburbs and the inner city left black and bankrupt. Under these conditions the "peaceful co-existence" spoken of in the Kerner Report will be increasingly impossible unless strong action is taken. Our time is short! The opposite of integration is disintegration.

Responsibility Beyond Dayton

Since quality integrated education should be available to all, equality of opportunity should be accessible to all children of the Dayton Metropolitan area as also to all children of the State of Ohio. The time is upon us when the old boundary lines are disappearing and there will be no place to run from the changes that must be made. Therefore, the Dayton Board of Education should begin immediately to:

1. Initiate action with the Boards of Education of suburban communities surrounding Dayton, looking toward possible consolidation.
2. Initiate action with the State Board of Education looking toward possible consolidation.

3. Initiate action to insure that dollars expended per student be equalized on a statewide basis. This would require the development of state-established minimal standards and some form of state evaluation.
4. Begin the necessary political action in the state legislature for the above changes to take place through the rule of law.
5. Check with the United States Office of Education concerning possible forms of assistance in pursuing this endeavor.
6. Begin preparing the people of Dayton educationally for the changes which are surely to come.

Attacking Isolation

Racial and economic isolation may be attacked broadly and basically on two fronts: The reassignment of students and the preparation of these students to work, share, learn, and live with each other in a productive way.

Concerning the reassignment of students. Various methods should be analyzed, evaluated and tabulated in order from least traumatic to most. We recognize that under present conditions of racial and economic isolation in Dayton some form of busing would be necessary either to implement or supplement whatever other methods are employed to effect school desegregation.

In no case should we be content with piecemeal desegregation since this procedure tends to focus tensions, fears and hostilities upon specific schools and this in turn creates problems that militate against true integration. At the same time careful attention must be given to the fears arising from distance, safety and busing "out" of the "neighborhood" area.

Preserving the human being. Whatever combination of methods is used, the Board must not allow people to be de-

humanized in the process, i.e., to be treated simply and solely as bodies to be pushed around. Let it be noted that our committee is concerned with true integration not simple desegregation. There is a vast difference between desegregation and integration. Desegregation breaks apart old patterns of isolation and division but integration aims to bring people together in mutual respect rather than mere mutual proximity.

We must emphasize, however, that integration is not intended to erase all identifiable ethnic and racial characteristics nor to homogenize them toward bland conformity. The resulting loss of spiritual and cultural heritage would be immense. Integration does not require that we all copy one another; only that we respect one another, learn from one another and move together toward fruitful achievement contributing to the common good. Individual rights must be protected and expanded but no one can justly claim for himself what he will deny to others.

Continuous curriculum change. Reassignment will be ineffective unless curricula are periodically reshaped, the teaching staff held to strict accountability for productive performance and the facilities used continually reassessed in the light of changing needs. Only so can quality education be made available to all children on an equal basis.

The detailed reports of each subcommittee in the chapters that follow should make this abundantly clear.

Concerning the preparation of people. All the people involved in reassignment should be given some part in the decision-making process by which it unfolds. People excluded from the social processes that affect them are thereby dehumanized and alienated, whether black or white, rich or poor, teacher, students or community residents.

Support systems. All the people involved in reassignment should be undergirded by well thought out *support systems* to make the readjustments called for, whether those affected

be students, teachers, parents, custodians, paraprofessionals, central office staff, clerical staff or community residents.

Funding. The magnitude of such preparation should be acknowledged by the provision of adequate *funds.* Ideals wither without the resources to implement them in a realistic way. At the same time we must remember that while action may be costly, inaction may ultimately be more costly.

Planned immediate action. We recognize that time for change in Dayton has run out! We must act now. But the action we take must be *well planned* to give the persons involved a true opportunity to adjust themselves to the demands placed upon them.

Evaluation. Whatever the process, it must be *evaluated* periodically by a representative group reflecting the entire community to make certain that no segments are given priority at the expense of others.

Summary. The presence and magnitude of the problem before us needs to be recognized by all the citizens of Dayton. Quality integrated education can help stop the flight to the suburbs, break the cycle of poor education, and the lack of job skills which handicap the minorities. The cost of this type of education will be small in relation to the total benefits society will reap.

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PLAINTIFF'S EXHIBIT No. 10

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DESEGREGATION STUDY
DAYTON PUBLIC SCHOOLS

By Doctor Gordon Foster

January 3, 1972

For several years the Dayton School Board, the Dayton Superintendent of Schools, professional school associations, various citizens advisory groups representing the Dayton community, and cooperating governmental agencies have been formulating policies and initiating efforts to equalize opportunities for education in the Dayton schools and improve the learning experience for all children who attend the Dayton system. The elimination of racial imbalance in the schools, the impartial employment and assignment of all staff personnel, a more relevant curriculum, broader community involvement, and an end to racial isolation and discrimination were the major goals to which these groups expressed commitment.

In August of 1967 the Board issued a "Statement of Intent" establishing directions and policies to effectuate these major goals. A "Freedom of Enrollment" policy was initiated in September of 1969. The Dayton Advisory Council on Education was established to advise the superintendent on planning and implementing desegregation efforts. In 1971 the "Committee of 75" was organized as an advisory body to deal with racial isolation in the schools. Outside assistance was arranged through such agencies as the Ohio State Department of Education, the Equal Educational Opportunities Office of the U.S. Office of Education, and the Office of Civil Rights. The Dayton Classroom Teachers Association and the Dayton Principals Association lent support.

All of these activities came to "a head" in a sense on December 8, 1971 when the Dayton Board adopted a series of resolutions committing itself to an integrated system in the fall of 1972. Specifically, it directed the superintendent to develop and implement plans for the racial and economic integration of pupils – by September 1, 1972.

This study is a direct result of the resolutions by the Board on December 8, 1971. Data for the study were furnished by the superintendent and his staff for the most part. The consultant team spent a total of 11 days on site and expedited the completion of the study to the maximum extent possible for two reasons: the study team has commitments beginning in January, 1972, for desegregation studies in other major cities; and the Dayton system will need to proceed with its planning for desegregation in the fall of 1972 as quickly as it can.

It should be noted that adequate pupil locater maps were not available by race or grade level so that recommended changes in pupil assignments had to be estimated on the basis of present elementary attendance areas. Since estimates for September, 1972 assignments also have to be made on the basis of 1971-72 figures, a margin of error must be allowed. It should also be noted that in most desegregation studies the local school administrative staff is by far the most knowledgeable body in terms of finalizing pupil assignments and developing transportation arrangements. The job of the outside expert is primarily to demonstrate possibilities and facilitate ideas and policies for a framework within which the local staff can complete the task.

In developing the Dayton plan an attempt was made to follow these general guidelines:

(1) Equitable treatment of both majority and minority pupils

(2) A plan that would meet constitutional requirements *(**Brown** v. **Topeka** and **Swann** v. **Charlotte-Mecklenburg**)*

(3) Economic feasibility: transportation would be kept to a minimum in getting the schools desegregated

(4) Safety factors would be observed

(5) The concept of schools as "community centers" would be maintained where possible

(6) Available classroom space and building facilities would be used to best advantage

In summary, the Dayton Board of Education and the Dayton Superintendent are to be commended for their leadership and wisdom in deciding to meet constructively the problems of racial and economic isolation in the Dayton schools. It is hoped that this study will provide the impetus to achieve their goals in September, 1972.

CURRENT STATUS OF DESEGREGATION IN DAYTON

The Dayton system has made considerable headway in certain aspects of school desegregation, not so much in others. A summary review will be given here of the current status of desegregation efforts with regard to the school faculties, classified personnel, administrative personnel, pupil assignment, and community and staff involvement.

SCHOOL FACULTIES

Desegregation of school faculties in Dayton has been accomplished under an agreement reached with the Office of Civil Rights (HEW) in 1971. The pattern of assignment has followed basically the court's ruling in *Montgomery* v. *Carr* which indicated that faculties should be assigned to each school in substantially the same racial proportion currently in effect at the elementary and secondary levels in the total system. Thus, 31 per cent of the faculty at X high school would be black if there were approximately 31 per cent blacks employed by the total system as secondary faculty personnel.

According to available data, district assignment and recruitment practices were seeking to maintain this pattern and, at the same time, attempting to improve faculty racial balance in employing new staff.

CLASSIFIED PERSONNEL

"Classified personnel," also known as "noncertificated personnel," for the purposes of this report refers to clerical, custodial, and food service job classifications in the Dayton Public Schools. Information released by the Superintendent's Office states the degree of desegregation of classified personnel as of mid-1971.

(1) While 33 per cent of the clerical personnel within the school system are black, 665 of them are working in predominantly black schools.

(2) While 47 per cent of the custodial personnel within the school system are black, 82 per cent of them are employed in predominantly black schools.

(3) While 39 per cent of the food service personnel within the total school system are black, 83 per cent of them are located in predominantly black schools.

It would appear that blacks hold the lesser-ranked and lower-paying jobs among classified personnel positions. The tendency to find blacks in classified posts stationed in predominantly black schools is common to urban schools; typically, people prefer to work close to home.

ADMINISTRATIVE PERSONNEL

The black-white ratio for administrative personnel as of 1970-71 is portrayed by the following table.

Administrative Posts: Racial Balance, 1970-1971

Position	*White*	*Black*	*% Black*
Central Office[a]	73	29	27.1
Building Principals	51	18	26.1
Assistant Principals	25	17	40.5
(Principals & Assts.)	(76)	(35)	(31.5)
Total Administrative[b]	176	72	29.0

[a] Data taken from Dayton Public Schools "School Integration," a report dated December, 1970, Table 2, p. 17. Under "Central Office" this table excludes personnel classified as "resource teacher," "psychologist," or "child accountant" although including them would not affect the proportion.

[b] All administrators, including those excluded under the "Central Office" category were included.

The 1971-72 comparable data were not available at the time this report was being prepared. It is understood, however, that the proportion of blacks in administrative posts has increased somewhat in the past year.

PUPIL ASSIGNMENT, 1971-72

Pupil assignment data are given in Table I for grades K-5, in Table 2 for grades 6-8, and in Table 3 for grades 9-12. There were 51 school buildings housing regular elementary (K-5) programs; eight of these were really double buildings occupying the same site so that there were only 47 elementary attendance zones. A total of 26,380 pupils were assigned at this level with a racial pattern of 44.4 per cent black.

There were five middle schools and 34 additional elementary

buildings housing grades 6-8. Pupils in these grades totalled 12,298, and 44.9 per cent of them were black.

There were 11 high schools. Patterson Co-op drew pupils from the entire system so that there were only 10 high school attendance zones. Grades 9-12 included 16,464 students, 38.3 per cent of whom were black.

A summary of student enrollment by race in 1971-72 is given in Table 4A, and a summary of attendance areas in Table 4B.

These data indicate the existence of severe racial isolation in pupil assignment patterns. If the criterion of "90 per cent or more pupils being of one race" is used to define a racially identifiable or racially segregated school then 40 of the elementary schools were segregated insofar as pupils in grades K-5 were concerned. Three middle schools and 7 high schools were also segregated under this criterion.

If the criterion of "more than 15 percent above or below the average racial distribution" is used to define a segregated school – a guideline that has been used in some cities and states – only five Dayton schools would be nonsegregated: Fairport, Hawthorne, McGuffey, Colonel White, and Patterson Co-op.

The characteristics of economic isolation, or a concentration of pupils in schools by similar family income levels, are equally clear although the data are not as readily available. Using Title 1 (ESEA) eligibility as an indicator of income levels (Table 4C), it is apparent that a high concentration of low-income families is assigned to schools in the southern and central parts of the district.

COMMUNITY AND STAFF INVOLVEMENT

On August 30, 1971, at its first meeting, the Committee of 75 heard the president of the Board comment that data showed "unequal educational opportunities for the poor and black students now exist in the Dayton School District . . ./and/that

the district is guilty of procedures which have led to the racial isolation of school children."

Community involvement to correct this situation was encouraged by the Committee of 75's recognition of the fact that desegregation — the physical mix of races in enrollment patterns — was not enough; that integration — living and working "side by side in mutual respect" was the necessary goal for the Dayton school community.

Other examples of good communications existing between the schools and the community are the passage of school millage funds, the activities of the Dayton Advisory Council on Education (DACE), the various programs with the Office of Economic Opportunity and other community agencies, plus the large amount of coverage given schools in the news media.

Communication has also occurred with employee groups through involvement of faculty and staff on committees, in interracial workshops, and in various efforts to complete faculty and staff desegregation successfully. The program of Equal Educational Opportunities in the Dayton Schools is to be commended for its efforts in this regard in working with staff, with students, and with the community.

RECOMMENDATIONS FOR DESEGREGATION OF PUPILS

The Board in its December 8 resolutions rescinded attendance zones as presently constituted, effective September 1, 1971 and asked for pupil assignment to schools by race and family income characteristics substantially proportionate to the total system pattern.

MIDDLE SCHOOLS

The first step in fulfilling this resolution would logically be the completion of the middle school program already stated.

Recommendation 1. — All pupils in grades 6-8 should be assigned to middle schools in September, 1972.

This will require establishing 10 present elementary buildings as middle schools. Based on data obtained from the administrative staff, on data in the recent Ohio State *Educational Facilities Evaluation*, and on team site visits and discussion the following schools were recommended as new middle schools:

Jane Addams	Lincoln
Belmont Elementary	Meadowdale
Brown	Webster
Gettysburg	Westwood
Grant	Wogaman

These schools are located around the district in such a way as to complement the five existing middle schools. Even though the buildings cannot be prepared as proper middle school fafilities for several years, the change should be made immediately.

Dayton's adoption of the "middle school" concept is educationally sound and, coordinated with the direction toward a unitary school system, can achieve two goals. One, education for pre-adolescents and early adolescents can be improved. Two, the resultant rezoning of attendance areas around middle schools can aid desegregation.

The middle school as a concept is in many ways comparable to junior high schools. They are intended to provide an orderly transition in learning experiences from the homeroom, one-teacher organization of the elementary school to the platoon system of the high school with the student's being expected to exert more self-direction. Many "middle schools" originated because a junior high school had to take in the sixth grade (or possibly the fifth and sixth) to relieve crowded conditions in elementary schools. Sometimes this caused a review of the curriculum.

Table 1

Student Enrollment by School and Race
Pre-Kindergarten and Grades K-5
Dayton Public Schools, 1971-72

	Pre-Kdg.		Kdg.		Gr. 1-5		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W	B	W	B	W		
Jane Addams	33	5	41	8	214	67	10	2	298	82	380	78.4
Allen	0	0	0	58	3	377	0	0	3	435	438	0.7
Belle Haven	0	0	7	101	39	473	0	0	46	574	620	7.4
Belmont Elementary	0	0	0	72	0	287	0	0	0	359	359	0.0
Brown	0	0	0	129	2	582	0	0	2	711	713	0.3
Carlson	0	0	51	1	333	1	0	0	384	2	386	99.5
Cleveland	0	0	0	152	1	725	0	0	1	877	878	0.1
Drexel	0	0	1	74	23	335	1	7	25	416	441	5.7
Eastmont	0	0	0	63	0	313	0	0	0	376	376	0.0
Edison	89	0	103	1	436	1	15	0	643	2	645	99.7
Emerson	6	57	8	68	22	411	0	15	36	551	587	6.1
Fairport	0	0	58	102	274	398	2	7	334	507	841	39.7
Fairview	0	0	6	65	19	382	0	4	25	451	476	5.3
Ft. McKinley	0	0	0	50	5	247	0	0	5	297	302	1.7
Franklin	0	0	0	90	0	534	0	8	0	632	632	0.0
Gardendale	32	5	43	19	211	88	0	0	286	110	396	72.2
Gettysburg	0	0	6	47	39	274	0	0	45	321	366	12.3
Grant	0	0	0	89	3	358	0	0	3	447	450	0.7
Greene	47	1	42	1	463	18	7	0	559	20	579	96.5
Hawthorne	23	13	15	41	61	176	0	0	99	230	329	30.1
Hickorydale	0	0	10	47	34	194	0	8	44	249	293	15.0
Highview	40	0	73	0	349	10	15	0	477	10	487	97.9
Huffman	0	40	0	71	1	505	0	9	1	625	626	0.2
Irving	78	1	102	0	576	3	20	0	776	4	780	99.5
Jackson Elementary	0	0	0	0	291	1	10	0	301	1	302	99.7

Table 1

Student Enrollment by School and Race
Pre-Kindergarten and Grades K-6
Dayton Public Schools, 1971-72

	Pre-Kdg.		Kdg.		Gr. 1-6		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W	B	W	B	W		
Jackson Primary	138	0	136	0	397	6	0	0	671	6	677	99.1
Jefferson Elementary	0	0	0	0	762	75	23	0	785	75	860	91.3
Jefferson Primary	0	0	100	35	443	51	0	0	633	86	719	88.0
Kemp	0	0	6	79	35	444	0	4	41	527	568	7.2
Lawton	0	0	0	54	1	252	0	7	1	313	314	0.3
Lincoln	0	0	1	113	2	518	2	8	5	637	642	0.8
Loos	0	0	4	65	27	317	1	4	32	386	418	7.7
Horace Mann	0	0	0	35	0	154	0	0	0	189	189	0.0
McGuffey	39	34	35	69	151	315	0	7	225	415	640	35.2
McNary	40	0	69	0	316	0	8	0	433	0	433	100.0
Meadowdale	0	0	0	42	2	256	0	0	2	298	300	0.7
Miami Chapel	127	0	0	0	354	0	0	0	481	0	481	100.0
Patterson Elementary	0	39	0	50	1	341	0	0	1	430	431	0.2
Residence Park Elementary	0	0	0	0	286	1	8	0	294	1	295	99.7
Residence Park Primary	0	0	102	0	346	1	0	0	448	1	449	99.8
Ruskin	0	37	0	77	0	436	0	15	0	565	565	0.0
Shiloh	0	0	0	61	5	304	0	0	5	365	370	1.4
Shoup Mill	0	0	0	20	1	116	0	0	1	136	137	0.7
Louise Troy	0	0	143	0	447	2	0	0	590	2	592	99.7
Valerie	0	0	6	18	25	116	0	3	31	187	218	14.2
Van Cleve	11	23	15	113	87	511	0	0	113	647	760	14.9
Washington	16	16	16	66	59	451	1	9	92	542	634	14.5
Weaver	129	0	114	0	734	3	21	0	998	3	1001	99.7
Webster	0	0	0	60	1	273	0	4	1	337	338	0.3
Westwood	54	0	107	0	586	5	17	0	764	5	769	99.3

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Plaintiffs' Exhibit 10

Table 1

Student Enrollment by School and Race
Pre-Kindergarten and Grades K-5
Dayton Public Schools, 1971-72

	Pre-Kdg.		Kdg.		Gr. 1-5		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W	B	W	B	W		
Wogaman	43	0	87	0	499	1	14	0	643	1	644	99.8
Gorman							12	89	12	89	101	11.9
Kennedy							24	129	24	129	153	15.7
TOTAL BLACK	945		1597		8966		211		11719			
TOTAL WHITE		271		2296		11755		339		14661		
TOTAL ENROLLMENT		1216		3893		20721		550		26380	26380	44.4

Table 2

Student Enrollment by School and Race
Grades 6-8
Dayton Public Schools, 1971-72

	Gr. 6-8		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W		
Jane Addams	187	23	7	1	174	24	193	87.3
Allen	1	190	0	0	1	190	191	0.5
Belle Haven	56	318	0	0	56	318	374	15.0
Belmont Elementary	0	183	0	0	0	183	183	0.0
Brown	9	345	0	0	9	345	354	2.5
Carlson	187	1	0	0	187	1	188	99.5
Cleveland	3	365	0	0	3	365	368	0.8
Cornell Hgts M.S.	567	217	0	0	567	217	784	72.3
Drexel	14	142	0	4	14	146	160	8.7
Eastmont	0	231	0	0	0	231	231	0.0
Emerson	10	210	0	9	10	219	229	4.4
Fairview	30	233	0	2	30	235	265	11.3
Ft. McKinley	2	147	0	0	2	147	149	1.3
Gardendale	114	43	0	0	114	43	157	72.6
Gettysburg	42	190	0	0	42	190	232	18.1
Grant	1	198	0	0	1	198	199	0.5
Hickorydale	23	112	0	4	23	116	139	16.5
Highview	209	5	9	0	218	5	223	97.8
Huffman	0	268	0	5	0	273	273	0.0
Jackson Elementary	407	2	14	1	421	3	424	99.3
Lawton	1	152	0	4	1	156	157	0.6
Lincoln	5	314	0	5	5	319	324	1.5
Longfellow M.S.	485	325	24	4	509	329	838	60.7
Loos	6	205	0	2	6	207	213	2.8
Horace Mann	2	93	0	0	2	93	95	2.1

Table 2

Student Enrollment by School and Race
Grades 6-8
Dayton Public Schools, 1971-72

	Gr. 6-8		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W		
MacFarlane M.S.	858	5	58	0	916	5	921	99.5
McGuffey	47	159	0	4	47	163	210	22.4
Meadowdale	41	181	0	0	41	181	222	18.5
Patterson Elementary	1	187	0	0	1	187	188	0.5
Residence Park Elementary	393	1	13	0	406	1	407	99.8
Ruskin	1	260	0	8	1	268	269	0.4
Shiloh	0	180	0	0	0	180	180	0.0
Shoup Mill	2	68	0	0	2	68	70	2.9
Valerie	15	108	0	1	15	109	124	12.1
Webster	1	152	0	2	1	154	155	0.6
Westwood	538	1	10	0	548	1	549	99.8
Whittier M.S.	721	4	23	0	744	4	748	99.5
Wogaman	335	1	8	0	343	1	344	99.7
Or. Wright M.S.	57	877	8	21	65	898	963	6.7
TOTAL BLACK	5351		174		5525			
TOTAL WHITE		6696		77		8773		
TOTAL ENROLLMENT		12047		251		12298	12298	44.9

Table 3

Student Enrollment by School and Race
Grades 9-12
Dayton Public Schools, 1971-72

	Gr. 9-12		Sp. Ed.		Ungraded		Total		Total	% Bl.
	B	W	B	W	B	W	B	W		
Belmont H. S.	54	1923	2	60			56	1983	2039	2.7
Dunbar	1284	0	85	0			1369	0	1369	100.0
Fairview	272	1154	0	0			272	1154	1426	19.1
Kiser	45	657	2	27			47	684	731	6.4
Meadowdale H. S.	82	1639	13	44			95	1733	1828	5.2
Patterson Co-op	546	1218	0	0			546	1218	1764	31.0
Roosevelt	1577	1	113	0			1690	1	1691	99.9
Roth	1080	38	69	4			1149	42	1191	96.5
Stivers	147	1014	7	79			154	1093	1247	12.3
Colonel White	757	918	36	18			793	934	1727	45.9
Wilbur Wright	68	1230	6	46			74	1276	1350	5.5
Continuing Education					35	20	35	20	55	63.6
Home Teaching			20	28			20	28	46	43.5
TOTAL BLACK	5912		353		35		6300			
TOTAL WHITE		9842		302		20		10164		
TOTAL ENROLLMENT		15754		655		55		16464	16464	38.3

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TABLE 4A

STUDENT ENROLLMENT BY RACE: SUMMARY
DAYTON PUBLIC SCHOOLS, 1971-72

	Black	White	Total	%Black
Pre-Kg and Grades K-5	11,719	14,661	26,380	44.4
Grades 6-8	5,525	6,773	12,298	44.9
Grades 9-12	6,300	10,164	16,464	38.3
TOTALS	23,544	31,598	55,142	42.7

TABLE 4B

ATTENDANCE AREAS: SUMMARY
DAYTON PUBLIC SCHOOLS, 1971-72

47 elementary attendance areas: Map I
(primary and elementary units on same site are counted as one attendance area)

5 middle school attendance areas: Overlay I

10 high school attendance areas: Map II
(Patterson Co-op, not on attendance area)

TABLE 4C

TITLE I ELIGIBLE SCHOOLS, 1971-72

NAME OF SCHOOL	Grade Span	Numbers of Children Residing in Attendance Areas: Public School Enrollment	Non Public Enrollment	Not Enrolled Drop Outs	Total	From Low Income Families: Number	From Low Income Families: Percent	1971-72 Estimated Number of Children Who Will Participate in Title I Activities from the Eligible Schools Below: Public	Non Public	Total
A	B	C	D	E	F	G	H	I	J	K
Edison	K-5	579	20	...	599	296	49.4	120	...	120
MacFarlane Mid.	6-8	998	31	...	1,029	489	47.9	...	...	...
Weaver	K-5	959	25	...		457	47.5	120	...	120
Irving	K-5	612	33	...	645	265	44.0	80	...	80
Grace A. Greene	K-5	551	25	...	576	243	42.2	40	...	40
McGuffey	K-8	781	82	...	863	343	39.6	80	...	80
Jackson	K-8	1,294	...	...	1,294	498	38.5	120	...	120
Miami Chapel-Troy	K-5	969	33	...	1,002	333	38.2	120	...	120
Roosevelt H.S.	9-12	1,582	222	575	2,379	714	30.0	...	...	...
Wogaman	K-8	954	30	...	984	288	29.3	40	...	40
Dunbar H.S.	9-12	1,222	73	195	1,490	430	28.9	...	...	...
Highview	K-8	715	30	...	745	211	28.8	40	...	40
Whittier Middle	6-8	807	33	...	840	202	24.1	...	...	...
Hawthorne	K-5	343	84	...	427	99	23.2	40	...	40
Emerson	K-8	872	204	...	1,076	227	21.1	80	...	80
Gardendale	K-8	526	...	...	526	106	20.2	40	...	40
Stivers H.S.	9-12	1,062	250	225	1,537	293	19.1	...	...	...
Huffman	K-8	887	53	...	945	174	18.4	40	...	40
Jefferson	K-5	1,598	104	...	1,702	303	17.8	80	...	80
Longfellow Mid.	6-8	941	305	...	1,246	210	16.9	...	...	...
Kiser H.S.	9-12	634	193	278	1,105	175	15.8	...	...	...
Jane Addams	K-8	579	...	...	579	91	15.7	40	...	40
Ruskin	K-8	813	98	...	911	132	14.5	40	...	40
Colonel White H.S.	9-12	1,676	340	130	2,146	304	14.1	...	...	...
Patterson	K-8	563	53	...	616	87	14.1	40	...	40
Van Cleve	K-5	778	350	...	1,128	157	14.0	40	...	40
Westwood	K-8	1,322	20	...	1,342	188	14.0	40	...	40
Washington	K-8	622	70	...	692	97	14.0	40	...	40
Roth H.S.	9-12	1,143	50	118	1,311	180	13.7	...	...	...
McNary	K-5	417	26	...	443	60	13.5	40	...	40

Patterson	K-8	505	53	...	616	87	14.1	40	...	40
Van Cleve	K-5	778	350	...	1,128	157	14.0	40	...	40
Westwood	K-8	1,322	20	...	1,342	188	14.0	40	...	40
Washington	K-8	622	70	...	692	97	14.0	40	...	40
Roth H.S.	9-12	1,143	50	118	1,311	180	13.7	...	...	...
McNary	K-5	417	26	...	443	60	13.5	40	...	40
Carlson	K-8	574	25	...	599	70	11.7	...	...	...
Lincoln	K-8	979	60	...	1,039	80	7.7	...	...	...
Cornell Hgts. Mid.	6-8	788	68	...	856	63	7.4	...	...	...
Residence Park	K-8	1,208	30	...	1,238	87	7.1	...	...	...
Franklin	K-5	666	104	...	770	44	5.7	...	...	...
Orville Wright Mid.	6-8	954	325	...	1,279	70	5.5	...	...	...
Allen	K-8	625	205	...	830	42	5.1	...	...	...
Webster	K-8	502	41	...	543	27	5.0	...	...	...
Wilbur Wright H.S.	9-12	1,213	223	324	1,760	77	4.3	...	...	...
Drexel	K-8	621	...	...	621	21	3.4	...	...	...
Fairport	K-5	775	68	...	843	26	3.1	...	...	...
Cleveland	K-8	1,264	596	...	1,860	26	1.9	...	...	...
Hickorydale	K-8	471	42	...	513	8	1.6	...	...	...
Fairview H.S.	9-12	1,279	298	194	1,771	26	1.5	...	...	...
Gettysburg	K-8	607	60	...	667	9	1.4	...	...	...
Belmont H.S.	9-12	1,893	162	295	2,350	33	1.4	...	...	...
Belmont Elementary	K-8	596	690	...	1,286	18	1.4	...	...	...
Fort McKinley	K-8	451	101	...	552	7	1.3	...	...	...
Brown	K-8	1,063	233	...	1,296	15	1.2	...	...	...
Lewton	K-8	491	150	...	641	7	1.1	...	...	...
Fairview Elementary	K-8	777	211	...	988	7	0.7	...	...	...
Kemp	K-5	609	208	...	817	6	0.7	...	...	...
Loos	K-8	674	215	...	889	5	0.6	...	...	...

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Numbers of Children Residing in Attendance Areas

1971-72

NAME OF SCHOOL	Grade Span	Public School Enrollment	Non Public Enrollment	Not Enrolled Drop Outs	Total	From Low-Income Families		Estimated Number of Children Who Will Participate in Title I Activities from the Eligible Schools Below		
						Number	Percent	Public	Non Public	Total
A	B	C	D	E	F	G	H	I	J	K
Grant	K-8	651	217	...	868	4	0.5	...	...	...
Meadowdale H.S.	9-12	1,680	220	158	2,058	10	0.5	...	...	...
Valerie	K-8	423	63	...	486	2	0.4	...	...	...
Shiloh	K-8	632	489	...	1,121	3	0.3	...	...	...
MeadowdaleElementary	K-8	575	252	...	827	2	0.3	...	...	...
Belle Haven	K-8	1,028	253	...	1,281	2	0.2	...	...	...
Eastmont	K-8	659	180	...	839	0	0.0	...	...	...
Horace Mann	K-8	323	207	...	530	0	0.0	...	...	...
Shoup Mill	K-8	284	20	...	304	0	0.0	...	...	...
Patterson Co-op H.S.	9-12	1,710	...	47	1,757	235	13.4*	...	...	...
Gorman	(Spec)	105	...	...	105	14	13.4*	...	...	...
Kennedy	(Spec)	165	...	...	165	22	13.4*	...	...	...
Others in School	(Spec)	126	...	11	137	18	13.4*	...	...	...
TOTAL		54,240	8,858	2,550	65,648	8,788	13.4			

*District-wide Schools

June, 1971

Plaintiffs' Exhibit 10

Plaintiffs' Exhibit 10

[PHOTO OMITTED]

School organization of grades has, historically, been determined not always by educational research but often by state legislation or by physical facilities. The middle school can be an administrative aid in solving some problem such as racial isolation, but research indicates that it should be, if properly handled, a way to improved education.

The Dayton middle schools should offer eventually such things as differentiated staffing and team teaching, modular scheduling, short exploratory courses, a wide range of electives and activities, increased emphasis upon student government, and greater concern about and communication with the community.

The middle school, beginning with grade 5 or 6 and ending with grade 8 is for that "between-ager" or transitional period covering early adolescence. Grades 6 to 8 cover this 11 to 13 year-old age span and constitute the most common middle school grouping. It cannot follow either an elementary or secondary model in content or process; it must focus upon the problems of puberty and understand the needs of the learners at this age. Research indicates that youngsters are reaching physical and social maturity earlier.

The middle school should not be established merely as an aid to desegregation. While it might permit children to get out of segregated neighborhood schools at an earlier age, high quality education will not result without careful preplanning of the instructional program. This "planning" can be simultaneous with the preliminary work which is necessary to develop an effective, integrated school system.

CLOSING SCHOOLS

The Dayton system does have some extra space available in some of its schools, and the student population projection indicates a declining number of students over the next five years. Some of the older, less-suitable buildings could therefore be abandoned.

Recommendation 2. — Hawthorne Elementary, Washington Elementary, Ft. McKinley Elementary, and Roosevelt High School should be closed as regular classroom facilities by September, 1972.

Hawthorne was originally constructed in 1887 with an addition in 1909. It is in a poor location hemmed in by an interstate highway and has an inadequate site of 0.8 acres. Washington was originally constructed in 1898 with additions in 1926 and 1969. It is on an inadequate site of 2.3 acres. Ft. McKinley is a newer building (1924) but is rated as inadequate for an instructional facility. Its site is only 2.7 acres. Roosevelt High is generally considered to be the least adequate Dayton high school facility with a poor site of 5.2 acres.

ELEMENTARY ASSIGNMENTS, 1972-73

Elementary attendance zones for 1971-72 are illustrated on Map 1 and middle school zones on Overlay 1. If two elementary schools discontinued (leaving Ft. McKinley as operational for the moment) and 10 elementary schools are changed to middle schools, a total of 35 elementary attendance zones would remain (Overlay 2). Estimated enrollment figures are given for these (Table 5) and for the 15 middle school zones that would be hypothetically created (Table 6 and Overlay 3). Without considering prekindergarten children as part of the basic K-5 pattern, it is possible to desegregate these elementary schools by leaving four of them as they are and by joining the remaining schools in 11 clusters (Table 7).

Recommendation 3. — The following assignment of K-5 pupils to elementary attendance zones be made September, 1972.

Fairport:	same as 1971-72
McGuffey:	same as 1971-72

Drexel:	same as 1971-72 plus Jane Addams zone
Gardendale:	same as 1971-72 plus 2/3 of Gettysburg zone
Cluster A:	Irving (Kg-1)
	Emerson (Gr. 2-5)
	Patterson (Gr. 2-5)
Cluster B:	Eastmont (Kg-2)
	Lewton (Kg-2)
	MC-LT (Gr. 3-5)
Cluster C:	Cleveland (Kg-2)
	Highview (Gr. 3-5)
	Mann (Kg-2)
Cluster D:	Carlson (Kg-1)
	Huffman (Gr. 2-5)
	Ruskin (Gr. 2-5)
Cluster E:	Van Cleve (Kg-1)
	Edison (Gr. 2-5)
Cluster F:	Jefferson (Kg-2)
	Fairview (Gr. 3-5)
	Valerie (Gr. 3-5)
Cluster G:	Belle Haven (Kg-2)
	Jackson (Gr. 3-5)
	Ft. McKinley (out)
Cluster H:	Allen (Kg-2)
	Kemp (Kg-2)
	Res. Pk. (Gr. 3-5)
Cluster I:	Hickorydale (Kg-2)
	Loos (Kg-2)
	Weaver (Gr. 3-5)
Cluster J:	Franklin (Kg-2)
	Greene (Gr. 3-5)

Cluster K: McNary (Kg-2)
Shoup Mill (Gr. 3-5)
Shiloh (Gr. 3-5)

The redistribution would leave all elementary schools within a range of 27.6 per cent black to 54.5 per cent black with most of the schools hovering closely to the 44.9 overall average. An effort was also made to cluster schools by economic levels. Table 7A illustrates the percentage of Title 1 (ESEA) families in each assigned cluster.

It should be noted that a total of 34 elementary (K-5) attendance areas would be left with Ft. McKinley not used. The clustered zones are based on the revised zones and not the current 1971-72 attendance areas.

Recommendation 4. — The assignment of pupils to carry out Recommendation 3 should be made in each of the clusters by the principals affected in cooperation with the central office staff. Pupils moved should in all cases be the farthest located from their present school assignment where a choice has to be made.

MIDDLE SCHOOL ASSIGNMENTS, 1972-73

Estimated enrollment for the 15 revised – but hypothetical – middle school zones is shown in Table 6. These are all contiguous zones made up merely as a paper operation to establish an intermediate base for final recommendations for the middle schools. Estimated enrollment figures for the recommended desegregation plan for middle schools are given in Table 8 and zones are shown on Overlay 5. The school zones listed are 1971-72 assignment areas. Thus, Jane Addams Middle School would be assigned pupils from the current Jane Addams Elementary zone, the Drexel zone, and the Shoup Mill zone.

TABLE 6

ESTIMATED ENROLLMENT BY SCHOOL AND RACE
REVISED ELEMENTARY SCHOOL ZONES
PRE KINDERGARTEN AND GRADES K-6
DAYTON PUBLIC SCHOOLS

	Pre Kdg.		Kdg.		Gr. 1-5		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W	B	W	B	W		
Allen	0	0	0	88	4	513	0	2	4	603	607	0.1
Belle Haven	0	0	7	101	30	473	0	0	46	574	620	7.4
Carlson	21	0	94	1	582	2	7	0	704	3	707	99.6
Cleveland	0	0	0	176	1	821	0	0	1	997	998	0.1
Drexel	33	5	42	82	237	402	11	9	323	498	821	39.3
Eastmont	0	0	0	122	2	552	0	0	2	674	676	0.3
Edison	112	13	118	42	497	177	15	0	742	232	974	76.2
Emerson	8	57	8	68	22	411	0	15	38	551	587	6.1
Fairport	0	0	58	102	274	398	2	7	334	507	841	39.7
Fairview	0	0	6	130	20	673	0	4	26	807	833	3.1
Ft. McKinley	0	0	0	50	5	247	0	0	5	297	302	1.7
Franklin	8	8	8	123	30	760	0	12	46	903	949	4.8
Gardendale	32	5	48	55	241	291	0	0	321	351	672	47.8
Greene	47	1	42	1	463	18	7	0	559	20	579	96.5
Hickorydale	0	0	11	58	43	263	0	8	54	329	383	14.1
Highview	62	0	117	0	599	10	22	0	800	10	810	98.8
Huffman	0	40	0	101	1	642	0	11	1	794	795	0.1
Irving	78	1	102	0	576	3	20	0	776	4	780	99.5
Jackson	138	0	136	0	688	7	10	0	972	7	979	99.3
Jefferson	0	0	190	35	1205	126	23	0	1418	161	1579	89.8
Kemp	8	8	14	112	64	669	1	9	87	798	885	9.8
Lawton	0	0	0	84	2	371	0	7	2	462	464	0.4
Loos	0	0	4	129	28	608	1	4	33	741	774	4.3

TABLE 5

ESTIMATED ENROLLMENT BY SCHOOL AND RACE
REVISED ELEMENTARY SCHOOL ZONES
PRE-KINDERGARTEN AND GRADES K-5
DAYTON PUBLIC SCHOOLS

	Pre Kdg.		Kdg.		Gr. 1-5		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W	B	W	B	W		
Horace Mann	0	0	0	83	0	345	0	0	0	428	428	0 0
McGuffey	39	34	35	59	151	315	0	7	225	415	640	35 2
McNary	53	0	96	0	462	1	12	0	623	1	624	99 9
MC – LT	127	0	143	0	801	2	0	0	1071	2	1073	99 8
Patterson Elementary	0	39	1	108	2	599	1	4	4	748	752	0 5
Residence Park	41	0	182	0	1072	6	21	0	1316	8	1327	99 5
Ruskin	0	37	0	134	1	694	1	19	2	884	886	0 2
Shiloh	0	0	0	61	5	304	0	0	5	365	370	1 4
Shoup Mill	0	0	0	20	1	116	0	0	1	136	137	0 7
Valerie	0	0	6	60	27	422	0	3	33	485	518	6 4
Van Cleve	11	23	15	113	87	511	0	0	113	647	760	14 9
Weaver	129	0	114	0	734	3	21	0	998	3	1001	99 7
Gorman							12	89	12	89	101	11 9
Kennedy							24	129	24	129	153	15 7
TOTAL BLACK	945		1597		8368		211		11719			
TOTAL WHITE		271		2296		11756		330		14661		
TOTAL ENROLLMENT		1216		3893		20721		550		26380	26380	44 4

TABLE 6
ESTIMATED ENROLLMENT BY SCHOOL AND RACE
REVISED MIDDLE SCHOOL ZONES, GRADES 6-8
BASED ON REVISED ELEMENTARY ATTENDANCE ZONES
DAYTON PUBLIC SCHOOLS

	Gr. 6-8 & Sp. Ed.			
	B	W	Total	%Bl.
Jane Addams M.S.				
Dravel	188	170	358	
	188	170	358	52.5
Belmont M.S.				
Mann	2	215	217	
Cleveland	3	426	429	
	5	641	646	0.8
Brown, M.S.				
Fairview	34	408	442	
Loos	11	379	390	
Shoup Mill	2	68	70	
	47	855	902	5.2
Cornell Hgts. M.S.				
Fairport	199	208	407	
Jefferson	667	24	691	
	866	232	1098	78.9
Gettysburg M.S.				
Ft. McKinley	2	147	149	
Gardendale	145	185	330	
Hickorydale	34	164	198	
	181	496	677	26.7
Grant M.S.				
Eastmont	1	363	364	
Lewton	1	222	223	
	2	585	587	0.3
Lincoln M.S.				
Huffman	0	350	350	
Ruskin	4	427	431	
	4	777	781	0.5

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TABLE 6 (Cont'd)

	Gr. 6-8 & Sp. Ed. B	Gr. 6-8 & Sp. Ed. W.	Total	%Bl.
Longfellow M.S.				
Greene	235	4	239	
Van Cleve	56	238	294	
	291	242	533	54.6
MacFarlane M.S.				
Edison	349	74	423	
Weaver	394	2	396	
	743	76	819	90.7
Meadowdale M.S.				
Belle Haven	56	318	374	
Shiloh	0	180	180	
Valerie	56	290	346	
	112	788	900	12.4
Orville Wright M.S.				
Franklin	47	416	463	
Kemp	18	482	500	
	65	898	963	6.7
Webster M.S.				
Allen	2	267	269	
McGuffey	47	163	210	
	49	430	479	10.2
Westwood M.S.				
Jackson	421	3	424	
McNary	229	1	230	
Res. Park	817	2	819	
	1467	6	1473	99.6
Whittier M.S.				
Emerson	10	219	229	
Irving	311	7	313	
Patterson	3	347	350	
	324	568	892	36.3
Wogaman M.S.				
Highview	390	6	396	
Carlson	358	1	359	
MC - LT	433	2	435	
	1181	9	1190	99.2
TOTALS	5525	6773	12298	44.9

TABLE 7

ESTIMATED ENROLLMENT BY SCHOOL AND RACE
GRADES (K-5) & SP. ED.
RECOMMENDED ELEMENTARY ZONES, 1972-73
DAYTON PUBLIC SCHOOLS

	B	W	B	W	Sp. Ed. B	Sp. Ed. W	Total B	Total W	Total	Cap.	% Bl.
(Maintain 1971-72 Attendance Zones)											
	Kg.		Gr. 1-5								
Fairport	58	102	274	398	2	7	334	507	841	981	39.7
McGuffey	35	59	151	315	0	7	186	381	567	981	32.8
(Maintain Revised Attendance Zones)											
	Kg.		Gr. 1-5								
Drexel	42	82	237	402	11	9	290	493	783	919	37.0
Gardendale	48	55	241	291	0	0	289	346	635	702	45.5
(Cluster A)											
	Kg – 1		Gr. 2-5								
Emerson	0	0	254	326	21	19	275	345	620	1399	44.4
Irving	217	380	0	0	0	0	217	380	597	1059	36.3
Patterson	0	0	240	481	0	0	240	481	721	879	33.3
Kg – 1 in Irving remain											
Kg – 1 in Emerson and Patterson to Irving											
Gr. 2 – 5 in Emerson remain											
Gr. 2 – 5 in Patterson remain											
Gr. 2 – 5 in Irving: 245 to Emerson; 236 to Patterson											
(Cluster B)											
	Kg – 2		Gr. 3-5								
Eastmont	224	334	0	0	0	0	224	334	558	1130	40.1
Lawton	225	247	0	0	0	7	225	254	479	684	47.0
MC – LT	0	0	499	550	0	0	499	550	1049	1747	47.6

TABLE 7 (Cont'd)

	B	W	B	W	Sp. Ed. B	Sp. Ed. W	Total B	Total W	Total	Cap.	% Bl.
Kg – 2 in Eastmont and Lewton remain							Gr. 3 – 5 in MC – LT remain				
Kg – 2 in MC – LT: 226 to Eastmont; 224 to Lewton							Gr. 3 – 5 in Eastmont and Lewton to MC – LT				
(Cluster C)											
	Kg – 2			Gr. 3-5							
Cleveland	242	532	0	0	0	0	242	532	774	1412	31.3
Highview	0	0	357	675	22	0	379	675	1054	1191	35.0
Mann	113	228	0	0	0	0	118	228	346	646	34.1
Kg – 2 remain in Cleveland and Mann							Gr. 3 – 5 remain in Highview				
Kg – 2 from Highview: 245 to Cleveland; 119 to Mann							Gr. 3 – 5 from Cleveland and Mann to Highview				
(Cluster D)											
	Kg – 1			Gr. 2-5							
Carlson	208	453	0	0	0	0	208	453	661	927	31.5
Huffman	0	0	238	618	0	0	236	618	854	1225	27.6
Ruskin	0	0	234	505	8	28	242	533	775	1170	31.2
Kg – 1 remain in Carlson							Gr. 2 – 5 remain in Huffman and Ruskin				
Kg – 1 from Huffman and Ruskin to Carlson							Gr. 2 – 5 from Carlson: 236 to Ruskin; 233 to Huffman				
(Cluster E)											
	Kg – 1			Gr. 2-5							
Van Cleve	231	336	0	0	15	0	246	336	582	713	42.3
Edison	0	0	486	507	0	0	486	507	993	1130	48.9
Kg – 1 in Van Cleve remain							Gr. 2 – 5 in Edison remain				
Kg – 1 from Edison to Van Cleve							Gr. 2 – 5 from Van Cleve: 345 to Edison				
(Cluster F)											
	Kg – 2			Gr. 3-5							
Jefferson	689	714	0	0	23	7	712	721	1433	1447	49.7

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TABLE 7 (Cont'd)

	B	W	B	W	Sp. Ed. B	Sp. Ed. W	Total B	Total W	Total	Cap.	% Bl.
Fairview	0	0	416	441	0	0	416	441	857	859	48.5
Valerie	0	0	349	291	0	0	349	291	640	765	54.5

Kg – 2 in Jefferson remain
Kg – 2 from Fairview and Valerie to Jefferson

Gr. 3 – 5 in Valerie and Fairview remain
Gr. 3 – 5 from Jefferson: 446 to Fairview; 366 to Valerie

(Cluster G)

	Kg – 2 B	Kg – 2 W	Gr. 3-5 B	Gr. 3-5 W	Sp. Ed. B	Sp. Ed. W	Total B	Total W	Total	Cap.	% Bl.
Belle Haven	423	448	0	0	0	0	423	448	871	1263	48.6
Jackson	0	0	452	430	10	0	462	430	892	1747	51.8
Ft. McKinley	0	0	0	0	0	0	0	0	0	542	

Kg – 2 in Belle Haven remain
Kg – 2 from Ft. McKinley and Jackson to Belle Haven

Gr. 3 – 5 in Jackson remain
Gr. 3 – 5 from Ft. McKinley and Belle Haven to Jackson
Make other use of Ft. McKinley School.

(Cluster H)

	Kg – 2 B	Kg – 2 W	Gr. 3-5 B	Gr. 3-5 W	Sp. Ed. B	Sp. Ed. W	Total B	Total W	Total	Cap.	% Bl.
Allen	286	305	0	0	0	0	286	305	591	871	48.4
Kemp	327	412	0	0	0	0	327	412	739	838	44.2
Res. Pk.	0	0	723	671	22	11	745	682	1427	1589	52.2

Kg – 2 in Allen and Kemp remain
Kg – 2 from Residence Park: 284 to Allen; 283 to Kemp

Gr. 3 – 5 in Residence Park remain
Gr. 3 – 5 from Allen and Kemp to Residence Park

(Cluster I)

	Kg – 2 B	Kg – 2 W	Gr. 3-5 B	Gr. 3-5 W	Sp. Ed. B	Sp. Ed. W	Total B	Total W	Total	Cap.	% Bl.
Hickorydale	150	165	0	0	0	0	150	165	315	716	47.6
Loos	306	405	0	0	0	0	306	405	711	881	43.0
Weaver	0	0	478	491	22	12	500	503	1003	1241	49.9

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TABLE 7 (Cont'd)

					Sp. Ed.		Total				
	B	W	B	W	B	W	B	W	Total	Cap.	% Bl.
Kg – 2 in Hickorydale and Loos remain							Gr. 3 – 5 in Weaver remain				
Kg – 2 from Weaver: 290 to Loos; 120 to Hickorydale							Gr. 3 – 5 from Hickorydale and Loos to Weaver				
(Cluster J)											
	Kg – 2		Gr. 3-5								
Franklin	227	451	0	0	7	12	234	463	697	1116	33.6
Greene	0	0	316	451	0	0	316	451	767	776	41.2
Kg – 2 in Franklin remain							Gr. 3 – 5 in Greene remain				
Kg – 2 from Greene to Franklin							Gr. 3 – 5 from Franklin to Greene				
(Cluster K)											
	Kg – 2		Gr. 3-5								
McNary	271	254	0	0	12	0	283	254	537	609	52.7
Shoup Mill	0	0	80	65	0	0	80	65	145	539	55.2
Shiloh	0	0	213	183	0	0	213	183	396	850	53.8
Kg – 2 in McNary remain							Gr. 3 – 5 in Shoup Mill and Shiloh remain				
Kg – 2 from Shoup Mill and Shiloh to McNary							Gr. 3 – 5 from McNary: 79 to Shoup Mill and 210 to Shiloh				

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TABLE 7A

PERCENTAGE OF TITLE I (ESEA) FAMILIES
BY RECOMMENDED ELEMENTARY ZONE CLUSTERS
DAYTON PUBLIC SCHOOLS

		Percentage of children in low income families
Cluster A:	Emerson	21
	Irving	44
	Patterson	14
Cluster B:	Eastmont	0
	Lawton	1
	MC-LT	38
Cluster C:	Cleveland	2
	Highview	29
	Mann	0
Cluster D:	Carlson	12
	Huffman	18
	Ruskin	15
Cluster E:	Van Cleve	14
	Edison	49
Cluster F:	Jefferson	18
	Fairview	1
	Valerie	0
Cluster G:	Belle Haven	0
	Jackson	39
	Ft. McKinley	1
Cluster H:	Allen	5
	Kemp	1
	Res. Pk.	7
Cluster I:	Hickorydale	2
	Loos	1
	Weaver	48
Cluster J:	Franklin	6
	Greene	42
Cluster K:	McNary	14
	Shoup Mill	0
	Shiloh	0

Plaintiffs' Exhibit 10

Recommendation 5. — The following assignment of Grade 6-8 pupils to 15 middle school attendance zones be made September 1, 1972:

Jane Addams Middle School: Jane Addams Elementary, Drexel and Shoup Mill

Belmont Middle School: Belmont Elementary, Eastmont, and Edison

Brown Middle School: Brown Elementary, Jefferson (3/4), and Loos

Cornell Hgts. Middle School: Fairport, Fort McKinley, and Jefferson (1/4)

Gettysburg Middle School: Gettysburg Elementary, Gardendale, Hickorydale, and Res. Pk. (1/4)

Grant Middle School: Grant Elementary, Highview, and Lewton

Lincoln Middle School: Lincoln Elementary, MC-LT, and Ruskin

Longfellow Middle School: Greene, Hawthorne, Van Cleve, and Allen

MacFarlane Middle School: Fairview, Bell Haven, and Weaver

Meadowdale Middle School: Jackson, Meadowdale Elementary, Shiloh, and Valerie

Orville Wright Middle School: Carlson, Kemp, and McNary

Webster Middle School: Huffman, Res. Park (3/4), and Webster Elementary

Westwood Middle School: Franklin, Washington, Westwood Elementary, and McGuffey

Whittier Middle School: Emerson, Irving, and Patterson

Wogaman Middle School: Cleveland, Wogaman, and H. Mann

The desegregation plan for middle schools effectively removes racial identifiability of schools as they would then range from 38.0 per cent black to 50.5 per cent black and would approach racial balance closely. A good mix of economic levels is also indicated as shown in the Table 8 assignments.

HIGH SCHOOL ASSIGNMENTS, 1972-73

Current high school assignment zones are shown on Map 2. Using the recommended middle school zones as a base (Table 8, Overlay 5), it would not be difficult to feed these zones directly into the nine high schools (Table 9, Overlay 6 – phasing out Roosevelt and leaving Patterson Co-op as a city-wide school). Since pupil locater maps are not available, estimated enrollment figures for the 1972-73 recommended high school attendance areas had to be extrapolated from estimated enrollments by race for the middle schools. Index figures of 103.1 for blacks and 131.4 for whites were used.

Recommendation 6. – The following assignment of grade 9-12 pupils to high school attendance zones be made September, 1972: (Middle school zones are the recommended 1972-73 zones and elementary zones are 1971-72.)

Belmont High:	Belmont M.S. and Grant M.S. plus Mann El.
Dunbar:	Lincoln M.S. and Wogaman M.S. minus Mann El.
Fairview:	McFarlane M.S. plus Webster El. and Res. Park El. (1/4)
Kiser:	Longfellow M.S.
Meadowdale:	Cornell Hgts. M.S. and Meadowdale M.S. plus Shoup Mill El.
Roth:	J. Addams M.S. and Gettysburg M.S.
Stivers:	Webster M.S. and Whittier M.S. minus Webster El. and Res. Pk. El. (1/4)

Col. White:	Brown M.S. plus McNary El. and McGuffey El.
Wright High:	Or. Wright M.S. and Westwood M.S. minus McNary El. and McGuffey El.

The redistribution of high school students would leave the 9 schools within a range of 44.3 per cent black to 32.3 per cent black.

It should be remembered that the above figures for all 3 levels of school organization are rough estimates based upon the best data immediately available. It is anticipated that many revisions and refinements in such a plan for desegregation of pupils would be made after careful review by the local staff.

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TABLE 3

ESTIMATED ENROLLMENT BY SCHOOL AND RACE
RECOMMENDED MIDDLE SCHOOL ZONES, GRADES 6-8, 1972-73
BASED ON CURRENT ELEMENTARY ATTENDANCE ZONES
DAYTON PUBLIC SCHOOLS

	Gr. 6-8 & Sp. Ed. B	Gr. 6-8 & Sp. Ed. W	Total T.	Cap.	%Bl.	%Title I
Jane Addams M.S.						
J. Addams Elementary	174	24	198			16
Drexel	14	146	160			3
Shoup Mill	2	68	70			0
	190	238	428	850	44.4	
Belmont M.S.						
Belmont Elementary	0	183	183			1
Eastmont	0	231	231			0
Edison	303	1	304			40
	303	415	718	819	42.2	
Brown M.S.						
Brown Elementary	9	345	354			1
Jefferson (3/4)	500	18	518			18
Loos	6	207	213			1
	515	570	1085	1208	47.5	
Cornell Hgts. M.S.						
Fairport	199	208	407			3
Ft. McKinley	2	147	149			1
Jefferson (1/4)	167	6	173			18
	368	361	729	900	50.5	
Gettysburg M.S.						
Gettysburg Elementary	42	190	232			1
Gardendale	114	43	157			20
Hickorydale	23	116	139			2
Res. Park (1/4)	102	0	102			7
	281	349	630	831	44.6	
Grant M.S.						
Grant Elementary	1	198	199			1
Highview	218	5	223			29
Lewton	1	156	157			1
	220	359	579	983	38.0	
Lincoln M.S.						
Lincoln Elementary	5	319	324			8
MC LT	433	2	435			38
Ruskin	1	268	269			15
	439	589	1028	1175	42.7	

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TABLE 8 (Cont'd)

	Gr. 6-8 & Sp. Ed. B	Gr. 6-8 & Sp. Ed. W	Total T.	Cap.	%Bl.	%Title I
Longfellow M.S.						
Greene	235	4	239			42
Hawthorne	46	73	119			23
Van Cleve	56	238	294			14
Allen	1	190	191			5
	338	505	843	1207	40.1	
MacFarlane M.S.						
Fairview	30	235	265			2
Belle Haven	56	318	374			0
Weaver	394	2	396			48
	480	555	1035	1292	46.4	
Meadowdale M.S.						
Jackson	421	3	424			39
Meadowdale Elementary	41	181	222			0
Shiloh	0	180	180			0
Valerie	15	109	124			0
	477	473	950	980	50.2	
Orville Wright M.S.						
Carlson	187	1	188			12
Kemp	0	378	378			1
McNary	184	2	186			14
	371	381	752	971	49.3	
Webster M.S.						
Huffman	0	273	273			18
Res. Park (3/4)	304	1	305			7
Webster Elementary	1	154	155			5
	305	428	733	788	41.6	
Westwood M.S.						
Franklin	29	312	341			6
Washington	36	208	244			14
Westwood Elementary	456	0	456			14
McGuffey	47	163	210			40
	560	683	1251	1532	45.4	
Whittier M.S.						
Emerson	10	210	220			21
Irving	311	2	313			44
Patterson	1	187	187			14
	322	408	730	1005	44.1	
Wogaman M.S.						
Cleveland	3	365	368			29
Wogaman	343	1	344			2
H.Mann	2	93	95			0
	348	459	807	1157	43.1	
TOTALS	5525	6773	12298		44.9	

Plaintiffs' Exhibit 10

TABLE 9

ESTIMATED ENROLLMENT BY SCHOOL AND RACE
RECOMMENDED HIGH SCHOOL ZONES, GRADES 9-12, 1972-73
BASED ON CURRENT ELEMENTARY ATTENDANCE ZONES
DAYTON PUBLIC SCHOOLS

	Gr. 9-12 & Sp. Ed. B.	W.	Total	Cap.	%Bl.
Belmont					
Belmont M.S. (Belmont - Eastmont - Edison)	312	545	857		
Grant M.S. (Grant - Highview - Lewton)	227	472	699		
	539	1017	1556		
(+) Mann El	2	122	124		
	541	1139	1680	2618	32.2
Dunbar					
Lincoln M.S. (Lincoln - MC - LT - Ruskin)	453	774	1227		
Wogaman M.S. (Cleveland - Mann Wogaman)	360	603	963		
	813	1377	2190		
	2	122	124		
	811	1255	2066	2453	39.2
Fairview					
MacFarlane M.S. (Fairview - Belle Haven - Weaver)	495	729	1224		
(+) Webster El	1	202	203		
(+) Res Park 1/4	104	0	104		
	600	931	1531	1845	39.2
Kiser					
Longfellow M.S. (Allen - Greene - Hawthorne - Van Cleve)	348	664	1012*	1245	34.4

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TABLE 9 (Cont'd)

	Gr. 9-12 & Sp. Ed. B.	W.	Total	Cap.	%Bl.
Meadowdale					
Cornell Hts. M.S. (Fairport - Ft. McKinley - Jefferson 1/4)	379	474	853		
Meadowdale M.S. (Jackson - Meadowdale - Shiloh - Valerie)	493	622	1115		
	872	1096	1968		
(+) Shoup Mill El	2	89	91		
	874	1185	2059	2950	44.3
Roth					
J. Addams M.S. (J. Addams - Drexel - Shoup Mill)	106	313	509		
Gettysburg M.S. (Gardendale - Gettysburg Hickorydale - Res. Park 1/4)	200	450	749		
	486	772	1258		
(-) Shoup Mill El	2	89	91		
	484	683	1167	1856	41.5
Stivers					
Webster M.S. (Huffman - Res Park 3/4 - Webster)	314	562	876		
Whittier M.S. (Emerson - Irving - Patterson)	332	536	868		
	646	1098	1744		
(-) Webster El	1	202	203		
(-) Res. Park 1/4	104	0	104		
	541	896	1437	1530	37.6
Col. White					
Brown M.S. (Brown - Jefferson 3/4 - Loos)	531	749	1280		
(+) McNary El	100	3	193		
(+) McGuffey El	48	214	262		
	760	966	1735	2288	44.3

TABLE 9 (Cont'd)

	Gr. 9-12 & Sp. Ed. B.	W.	Total	Cap.	%Bl.
W. Wright					
Or. Wright M.S. (Carlson - Kemp - McNary)	383	501	884		
Westwood M.S. (Franklin - McGuffey - Washington - Westwood)	586	897	1483		
(-) McNary El	100	3	103		
(-) McGuffey El	48	214	262		
	731	1181	1912	2075	38.2
Sub-Totals	5699	8900	14599		39.0
(+) Patterson Co-op	546	1218	1764	2337	31.0
(+) Ungraded	35	20	55		
(+) Home Teaching	20	26	46		
TOTAL H.S.	6300	10164	16464		38.3

TRANSPORTATION OF PUPILS

It is obvious that pupil transportation will be increased if genuine desegregation occurs. A rough estimate of increased transportation needs is included as an attachment to the report along with an explanation of how the cost of such transportation might be met. Under new Ohio legislation for local district reimbursement for pupil transportation expenses it would appear that transportation costs for the desegregation plan can be met wholly or in large part out of state funds with no increase in local budget.

[PHOTO OMITTED]

GENERAL RECOMMENDATIONS FOR DESEGREGATION

In Part I of this report, the current status of the desegregation effort in the Dayton City Schools was reviewed. That analysis was based upon current information provided by the Superintendent.

Part II gave specific recommendations for ending the racial imbalance in enrollments for the various schools at different grade levels.

This section gives some general comments and recommendations which may assist school and community leaders in their affirmative action toward an integrated school system.

An annual review of faculty assignments by school and teaching field should be made to determine to what extent race should be a consideration in recruitment, employment, and assignment activities. The need for racial balance should be a reality to be considered not only in school policy but in negotiating master contracts.

Inservice education for integration needs to be relevant, required, rewarded, and continuous. A planning committee should involve teachers, administrators, students, community advisers, and representatives of area institutions of higher edu-

cation. The greater use of teacher aides providing biracial teams should be made where feasible.

While the ratio of blacks and whites is fairly reasonable for administrative staff in Dayton, the following general recommendations are made.

1. Until full integration is achieved district-wide, the tendency to put black administrators in schools having a high proportion of black pupils or which are located in black communities should be avoided. Biracial administrative teams should be assigned where there is more than one building administrator.

2. Black administrators should be given an equal opportunity to work in line as well as staff positions in the administrative structure.

When the desegregation plan becomes reality the transfer policy for pupils should be rewritten to discontinue all optional zones or free enrollment. Transfers only for health or pertinent educational or administrative reasons should be allowed. Policing of pupil addresses will need to be made.

In order to facilitate up-to-date pupil assignment operations it is recommended that for the immediate situation pupil locater information and a set of good zone maps be developed. After this it is recommended that a computer-based pupil data system be effected. The Miami Desegregation Center is currently publishing a computerized operational plan for desegregation of pupils which can be used very easily in a system such as Dayton once the pupil data base is established.

The following general recommendations are given for community and school representatives.

1. School representatives should meet regularly with their counterparts from all Dayton Standard Metropolitan Service Area (SMSA) agencies and institutions to communicate about respective programs and to achieve maximum coordination of and impact from various

service efforts. Such problems as housing patterns, metropolitan government, and cooperative educational efforts should be explored.

2. The Dayton Advisory Council on Education (DACE) should be continued with a provision for annual review by DACE and the District as to the representativeness and activities of the Council. Established to advise the Superintendent on such matters as desgregation, its need will increase as desegregation becomes integration.

3. While mass media are valuable, they do not replace small discussion groups in the total public information program. These groups should be continued at the local school level and involve principals, teachers, and other employees who previously have become cognizant of the goals of an integrated school system through the inservice programs discussed above.

A continued and improved analysis should be made of socioeconomic patterns of students so that this factor can become a more effective input to the student assignment process.

If not already part of the program, curriculum units concerning human relations, minority group cultures, urban government and ecology, and family finance should be included at each instructional level.

The entire grading, reporting, counseling, and testing programs should be reviewed in light of desegregated schools compared to traditional schools. Grouping practices for instruction are particularly vulnerable.

Many parents and other citizens enjoy their schools as community centers, too. They may see desegregation as a threat to this activity. The Board should insure, by policy statement, that any desegregation plan will protect the community use of school facilities in a secure fashion and, if necessary, provide transportation so the community center

concept will be implemented. Desegregation in extracurricular activities is an essential component of any unitary plan.

The Board should in January, 1972, place bids for additional buses for September delivery so that economies in group bidding can be effected. Simultaneously, local transit companies might be invited to submit a comparative cost estimate.

Security of buildings and children is a concern especially where desegregation has been suddently imposed upon a school system. At the secondary level it is strongly recommended that student biracial advisory committees become a part of the school's operation. Urban secondary school principals can make effective use of such committees in affirmative action to prevent student unrest.

Districts which are segregated typically are operating substandard programs in some schools, and desegregation usually forces an upgrading of the instructional program. It is assumed that Dayton is no different than other major cities and that additional financial aid will be necessary. All federal and state sources should be investigated including the new Emergency School Assistance Program should it become law; Title IV, P.L. 88-352 monies, and funding under the new Educational Renewal Centers concept (USOE).

The recommended plan attempts to desegregate schools in such a manner that they will not be racially identifiable: not black schools, nor white schools — just schools. If such a plan is to work effectively the entire metropolitan Dayton area should be involved and not just the city. It is recommended that the Board continue its effort to involve the metro community. Particular attention should be given to the current lawsuits in Indianapolis, Richmond (Virginia), and Detroit.

The prekindergarten pupils were not included in the desegregation plan. It is recommended that they be sent to their nearest elementary school location and where capacity does not permit their being housed, transportation be provided to the next building with space available.

[PHOTO OMITTED]

APPENDIX I

Estimation of transportation costs, reimbursements and financing, assuming 40% of current enrollments being transported:

Students

53,400 public students x 40%	21,360
Plus non-public students now being transported	1,000
Total Students	22,360

Trips

50 high-school pupils per bus — 17,000 x 40% =	6,800 or 136 trips	
70 elementary pupils per bus — 36,400 x 40% =	14,560 or 208	"
60 non-public pupils per bus	1,000 or 17	"
Total Trips	361	

Capital Outlay — Vehicles

2.75 trips per bus = 131 buses + 13 spares = 144 total vehicles
Less vehicles already Board-owned — 14

Net Additional Buses Needed 130

Estimated State bid price $9,000 x 130 vehicles = $1,170,000
Estimated State reimbursement @ 27% = 315,900

Net Local Purchase Cost $ 854,100

Capital Outlay — Facilities

Land — 5 acres with proper access	$ 100,000
New building with 8 vehicle bays	300,000
Asphalt paving, fencing, lighting	35,000
Equipment	15,000
Estimated Building Cost	$ 450,000

Estimated State Reimbursement for Operations

Board-owned vehicles — $14 per student + $22 per mile
22,360 x $14 = $313,040 + 80,000 miles x $22 = $176,000

Total $489,040

A Contract vehicles — $16 per student + $29 per mile
22,360 x $16 = $357,760 + 80,000 miles x $29 = $232,000

Total $589,760

reduce

Plaintiffs' Exhibit 10

Estimated Operating Cost

Board-owned buses – 22,300 pupils x $50 each = $ 1,118,000
A Contract buses – 22,300 pupils x $67 each = 1,494,120

Estimated Operating Cost Less State Reimbursement

	Board-owned	A Contract
Estimated operating cost	$1,118,000	$1,498,120
Estimated State reimbursement	489,040	589,760
Net Operating Cost	$ 628,960	$ 908,360

Savings with Board-owned vehicles = $279,400

If savings were applied to capital investment of $1,304,100 (vehicles and building), payback would be accomplished in 4.6. years.

FINANCING THE LOCAL COST

	1972	Annual
Needs		
Net local operating cost	$ 251,584	$ 628,960
Local capital outlay	1,304,100	-0-
Total Needed	$1,555,684	$ 628,960
Sources		
Maintain 1970 level of local funding	$ 433,000	
From new State funds*	1,122,684	
Total Available	$1,555,684	

*Principally from the new Municipal Overburden fund. The district will receive $20 per pupil, or approximately $1,060,000 a year, from that part of the newly enacted State program.

•U.S. GOVERNMENT PRINTING OFFICE: 1972-715-070/158-7218-111

PLAINTIFF'S EXHIBIT 11A

[LETTERHEAD OF DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, WASHINGTON D.C. 20201]

OFFICE OF THE SECRETARY

Dear Dr. Carle:

Representatives of the Office for Civil Rights conducted a Title VI Compliance Review of the Dayton Public Schools during the period November 12-22, 1968. We have completed our analysis of the information gathered during the review and have made the determination that your district is not complying with Title VI of the Civil Rights Act of 1964.

An analysis of the data obtained during the review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff. Thus, all Negro principals are assigned to predominantly Negro schools, as are 11 of the 14 Negro assistant principals; 156 out of 181 Negro high school teachers are assigned to schools where Negroes constitute 92 percent of the total enrollment. Over 85 percent of the Negro elementary teachers instruct in schools having a preponderance of Negro pupils, and only 14 percent of teachers of the white race are in schools where Negroes are in the majority. The assignment of counsellors and coaches follows a similar pattern.

The existence in your district of a substantial duality in terms of race or color with respect to distribution of pupils in the various schools, is a matter of concern to us. The fact appears to be that of a total of 5,627 Negro high school pupils, approximately 85 percent are concentrated in 3 high schools in which the percentage of Negro attendance ranges from 92.3 percent to 100 percent. Similarly, 15,479 (approximately 85 percent) Negro elementary pupils attend 20 out of the 53

elementary schools in your district. It is noteworthy that in 17 of these 20 schools, Negroes constitutes 90-100 percent of the total enrollment.

Our review also indicates that students at Roosevelt High School are not afforded the same educational opportunity as other students in your system.

PLAINTIFF'S EXHIBIT 11F

[LETTERHEAD OF DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, OFFICE OF THE SECRETARY, WASHINGTON, D.C. 20201]

October 14, 1970

Dr. Wayne Carle
Superintendent of Schools
The Dayton Public Schools
348 West First Street
Dayton, Ohio 45402

Dear Dr. Carle:

I am responding to your night telegram of October 8, 1970 to Dr. Henderson which has been referred to me for reply. In this telegram you request our interpretation of the underlined [italicized] portion of the following stipulation contained in the DHEW Office for Civil Rights/Dayton Board of Education Agreement on faculty desegregation.

"It is the intention of this Board that each school staff throughout the district will have a racial composition *that reflects the total staff of the district as a whole.*"

During the 1969-70 school year when the agreement to desegregate the Dayton faculty and staff was negotiated and accepted by the DHEW Office for Civil Rights and the Dayton Board of Education, the racial composition of the total

Dayton professional staff was 70 percent white and 30 percent black. Consequently, we would expect that by September 1971, the professional staff at each elementary and secondary school subject to the jurisdiction of the Dayton Board of Education would reflect a racial composition of approximately 70 percent white and 30 percent black. With less than a year to go until the September 1971 deadline perhaps it would be useful to restate the legal basis on which the Dayton Board of Education is obligated to desegregate its teaching faculty.

In *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19 (1969), the Supreme Court unanimously agreed that school districts must end segregation "at once" and operate integrated systems "now and hereafter." See also *Northcross* v. *Board of Education of Memphis,* 397 U. S. 232 (1970); *Carter* v. *West Feliciana Parish School Board,* 396 U. S. 290 (1960). This obligation to desegregate encompasses all facets of the operation of an elementary and secondary school system, including the hiring and assignment of faculty. *Green* v. *County School Board of New Kent County,* 391 U. S. 433 (1968).

The Supreme Court in *United States* v. *Montgomery County Board of Education,* 395 U. S. 225 (1969), reasserted the duty of a school district to desegregate totally its faculty and approved an Alabama district court order which required substantially the same ratio of Negro to white faculty in each school as the ratio of Negro to white faculty in the entire system. In *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211, 1217-18 (5th Cir. 1969), reversed on other grounds, 396 U. S. 290 (1970), the United States Court of Appeals for the Fifth Circuit required school districts to meet these same faculty ratio requirements.

President Nixon in his March 24, 1970, Statement on Desegregation of America's Elementary and Secondary Schools affirmed that segregation of teachers must be eliminated and asserted that "each school system in this Nation, North and South, East and West, must move immediately, as the Supreme

Plaintiffs' Exhibit 11F

Court has ruled, toward a goal under which 'in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system.'" A copy of the President's Statement is enclosed. Consequently, the Department of Health, Education, and Welfare, in its enforcement of Title VI of the Civil Rights Act of 1964, has adopted the same faculty ratio requirement which the Fifth Circuit mandated in *Singleton,* which the Supreme Court mandated in *Montgomery,* and which the President applied nationwide in his March 24, 1970 Statement.

Finally, during 1969 the Dayton Board of Education concluded a voluntary but legally binding agreement with the Department of Health, Education, and Welfare's Office for Civil Rights to desegregate its faculty and staff by September 1971. In agreeing to desegregate voluntarily, the Board waived its opportunity for an administrative hearing on this Office's finding of probable noncompliance. In return for the Dayton Board of Education's agreeing to a negotiated settlement and foregoing a lengthy and costly administrative hearing, this Office, instead of requiring Dayton to transfer immediately many of its professional personnel, permitted a two year period for Dayton to desegregate gradually its faculty and staff and did not require as a condition of settlement that the Dayton School Board admit to the veracity of our March 1969 findings of noncompliance.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely yours,

/s/ FREDERICK T. CIOFFI
Frederick T. Cioffi, Coordinator
Northern and Western States
Education Division
Office for Civil Rights

Enclosure

cc: Chief State School Officer
Regional Civil Rights Director

PLAINTIFF'S EXHIBIT 12

[LETTERHEAD OF STATE OF OHIO, DEPARTMENT OF EDUCATION, COLUMBUS 43215]

June 7, 1971

Dr. Wayne Carle
Superintendent
Dayton Public Schools
348 West Fifth Street
Dayton, Ohio 45402

Dear Dr. Carle:

I am enclosing with this letter a report which has resulted from your earlier request that the Ohio State Department of Education prepare alternatives asked for by the Dayton Board of Education in its resolution of April 29, 1971. As you know, we had previously met with representatives from the Ohio State Department of Development, the Ohio State Department of Urban Affairs, the Ohio Education Association, the Ohio Civil Rights Commission, the Division of Equal Educational Opportunities, the Department of Justice, the Ohio State University, and other organizations, agencies, and individuals to discuss ways of providing such assistance to school systems in Ohio.

Under dateline March 12, 1971, a report was forwarded concerning your earlier request for demographic development of Dayton City Schools enrollment projections for reorganized schools. A team of counsultants and specialists was formed and financed through our Office of Equal Educational Opportunity to assemble data and make recommendations.

Following your most recent request, this team effort was enlarged to include representativs from the Program for Equal Educational Opportunity at the University of Michigan and other university centers. During the weekend of May 7-9,

1971, you, as Superintendent of Dayton's public schools, members of your staff, and experts on school integration from Alabama, North Carolina, Virginia, Washington, D.C., Ohio, and Michigan met to discuss the Dayton schools' problems, to plan strategies for change, and to outline suggestions for achieving the resolution's goals. As the conference proceded, lengthy telephone conversations were held with other experts in Arizona, New Mexico, New York, Illinois, Indiana, Pennsylvania, Wisconsin, and North Carolina. The attached document is one product of that conference and these conversations.

Persons selected for participation in the development of these recommendations were chosen by three criteria in their order of importance: (1) their credentials and backgrounds are impecable; (2) they are personally and professionally committed to quality integrated education; and (3) they are experts in such fields as school administration, curriculum, educational change, jurisprudence, educational planning and development, and human relations. Each person came at his or her own expense, and no reimbursement was either requested or offered.

Many alternatives were suggested. Their range is indicated in this report. Numerous strategies, methodologies, techniques, and possibilities were discussed and catalogued. The team of experts concluded that the resolution passed by the Board on April 29, 1971, was not one which could be dealt with effectively in detail until the Dayton Board commits itself to one of the alternative policies suggested in this report – or to some other which may have been considered, but rejected, as a reasonable action that the Board could take.

As the report suggests, in view of prevailing legal and moral circumstances (the realities referred to on pages 13 and 14), only the one alternative policy is deemed logical and feasible. Therefore, it is the one to which the team of experts devoted their most serious attention.

I recommend, therefore, the following:

1. That the attached document be transmitted as official recommendations from the Ohio State Department of Education to the Dayton Board of Education through their Superintendent;

2. That the Dayton Board of Education be urged to fulfill their collective duty to adopt the recommended policy immediately for correcting "the conditions that offend the Constitution;"

3. That the Dayton Board of Education be informed that if the recommended policy is adopted and ordered implemented – or an alternative policy that would achieve similar results – they can expect to receive continuing assistance from the Ohio State Department of Education and the consortium of other agencies, organizations, groups and individuals referred to above for completing development of strategies, methodologies, and ways of achieving the goals stated in the April 29 resolution; and

4. That upon adoption of the policy by the Dayton Board of Education, the consortium of consultative services which helped to formulate this report be made available to assist the Superintendent and his staff in development of those administrative strategies, methodologies, and techniques essential for implementation of the policy. Once these have been developed formally, the "broadly representative committee" referred to in the Board's resolution would be utilized to evaluate and to advise the Board on such plans.

The request received from Dayton was twofold. I can report also to you that proposals for financial assistance are being developed in accord with the Board's request. A meeting was held today to follow progress of The Emergency School

Assistance funds. Eligibility factors are still cloudy, but one certainly is a definite need for resolutions to be converted into policy statements!

Since Dayton is the first of Ohio's major urban school systems to take this important step toward fulfillment of some of the most basic of American ideals, I personally pledge my continuing support to you and to the school children in Dayton for that fulfillment. I have also been asked to make that pledge for the entire team of persons who have contributed to the preparation of this report.

Dr. Charles Glatt, who gave major direction to these two efforts, has just received official notice that a contract has been signed between the Ohio State University's Research Foundation and the U.S. Office of Education for establishment of The Midwest Institute for Equal Educational Opportunities. As its Director, he also extends that pledge from The Midwest Institute.

Sincerely,

/s/ ROBERT O. GREER
Assistant Superintendent
Urban Education

ROG:mh

cc: Members, Dayton Board of Education
Administrative Staff

[ATTACHED DOCUMENT]

RECOMMENDATIONS OF THE STATE DEPARTMENT OF EDUCATION TO THE DAYTON BOARD OF EDUCATION

> School integration is a complex and difficult task; to suggest otherwise would be naive. But it can be achieved by persons with courage, commitment and skill who have the political and professional support of major institutions inside and outside the school. There will be many times when people committed to integration will experience anxiety, fear, doubt, hostility, and other equally unsettling emotions. Nagging questions will plague the dedicated educator about his effectiveness in creating inter-racial collaboration. This is natural. It is also important to relax, to help yourself and your students accept and work within their own and the school's limitations. Integration can be an enriching and rewarding process for both students and educators. We wish you good luck.

The above paragraph, taken from Planning Educational Change; Integrating the Desegregated School, states succinctly and well the attitude of the Ohio State Department of Education toward the recent request for assistance from the Dayton Public School System for achieving those goals stated in the resolution passed by the Dayton Board of Education on April 29, 1971.

THE BOARD'S POSITION.

The Dayton Board of Education has passed various and sundry resolutions in recent years designed to equalize and to extend educational opportunities, to reduce racial isolation, and to establish quality integrated education in the schools. Many study sessions have been held with the administrative staff, with the community, and with experts from outside the school system. Numerous alternatives have already been suggested, adopted, and in some instances implemented. The latest resolution, passed by the Dayton Board of Education on April 29, 1971, reads:

> WHEREAS the Dayton Board of Education recognizes that unequal educational opportunities for minority students now exist, and
>
> WHEREAS current resources available to the Board have been fully used to extend learning opportunities and are now stretched to their limit, and

WHEREAS the Congress is considering the Emergency School Assistance Program that may supplement other funds for improving education and reducing racial and economic isolation.

NOW, THEREFORE BE IT RESOLVED that the Superintendent of Schools be authorized and directed to request the assistance of the State Department of Education, Office of Equal Educational Opportunity, to provide technical assistance for the development and submission to the Board of alternative plans for reducing racial and economic isolation of pupils and improving educational opportunities in the Dayton Public Schools, and for developing proposals for outside funding to implement the same, subject to the approval of the Board.

BE IT FURTHER RESOLVED that the President of the Board, in consultation with the Board, appoint a broadly representative committee to evaluate and advise the Board on plans that are developed pursuant to this resolution; and to communicate with and seek the cooperation of civic, governmental, higher educational, religious, communications, labor, business, and other segments of the community in the Dayton area regarding such plans.

The Ohio State Department of Education interprets that resolution to mean that the Dayton Board of Education intends, and indeed is legally committed to, achievement of the goals stated therein. The Dayton Board of Education is certainly to be congratulated for their commitment inasmuch as their posture on school integration is completely consistent with currently evolving history of our nation. The paragraphs below indicate that consistency.

THE UNITED STATES SUPREME COURT.

In 1954, the United States Supreme Court held that separate schools are inherently unequal (Brown vs. Board of Education.) In 1968, the Court required that "The burden on a school board today is to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." (Green vs. County School Board.) Mr. Justice Black in 1969 commented: "My belief [is] that there is no longer the slightest excuse, reason, or justification for further postponement of the time when every public school system in the United States will be a unitary one . . ."

In 1971, the United States Supreme Court ruled unanimously: "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." The Court also added, "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." (Swann vs. Board of Education.)

THE CONGRESS OF THE UNITED STATES.

The Congress' most notable stand to date on this issue was the Civil Rights Act of 1964 and its later modifications. Most of the Legislative moves on social issues have been designed to correct, to protect, and to assure rights, privileges, and responsibilities of minority children, primarily because of the ill effects of racial isolation, insulation, and discriminaton on the minority child. Damage which results from such factors is not so neatly restricted.

During April and May of 1970, the Select Committee on Equal Educational Opportunity of the United States Senate conducted extensive hearings and collected evidence from a wide variety of researchers, scholars, educators, and other citizens. The basic results of that investigation have been condensed into Section 2 of Senate Bill 683 (92nd Congress, 1st Session): "The Congress hereby finds that the segregation of schoolchildren by race, color, or national origin, *whatever its cause or origin*, is detrimental to *all* children and deprives them of educational opportunity: that conditions of such segregation exist throughout the Nation, and, as a result, substan-

tial numbers of children are suffering educational deprivation; . . ." (Italics not in the original.)

THE EXECUTIVE BRANCH.

Because of some lingering legal and judicial obfuscation, racism, and other related phenomena, all-black and all-white schools may persist into this nation's future. Yet, the *mode* of future education in this nation has clearly been spelled out — our schools will be racially mixed, not those where American children will be segregated by race. The President's Committee on Civil Rights, a quarter century ago, stated: "It is impossible to decide who suffers the greatest moral damage from our civil rights transgressions, because all of us are hurt." Other presidents before Harry Truman had made similar statements, and those who have come after him have concurred. President Lyndon Johnson on November 17, 1965, stated in *Racial Isolation in the Public Schools*:

> Although we have made substantial progress in ending formal segregation of schools, racial isolation in the schools persists — both in the North and the South — because of housing patterns, school districting, economic stratification and population movements. It has become apparent that such programs are more subtle and complex than those presented by segregation imposed by law.

On March 3, 1970, President Nixon stated:

> I am well aware that "quality education" is already being interpreted as "code words" for a delay of desegregation. . . . We must never let that meaning take hold. Quality is what education is all about; desegregation is vital to that quality; as we improve the quality of education for all American children, we will help them improve the quality of their own lives in the next generation.

Representatives of the Office for Civil Rights conducted a Compliance Review of the Dayton Public Schools during November of 1968. As one result of that review, a concern was expressed about evidence of racial segregation among the pupils in the Dayton Public School System:

> The existence in your district of a substantial duality in terms of race or color with respect to distribution of pupils in the various schools, is a matter of concern to us. The fact appears to be that of a total of 5,627 Negro high school pupils, approximately 85 per cent are concentrated in 3 high schools in which the percentage of Negro attendance ranges from 92.3 per cent to 100 per cent. Similarly, 15,479 (approximately 85 per cent) Negro elementary pupils attend 20 out of the 53 elementary schools in your district. It is noteworthy that in 17 of these 20 schools, Negroes constitute 90-100 per cent of the total enrollment.

On January 14, 1971, Mr. Stanly Pottinger, Director of the Office for Civil Rights stated in a memorandum to Chief State School Officers and School Superintendents: "Title VI of the Civil Rights Act of 1964 requires that students in a school district receiving Federal financial assistance be afforded educational services free from discrimination on the ground of race, color or national origin."

THE NATIONAL EDUCATION ASSOCIATION.

Principle 1, section 5, of the National Education Association's Code of Ethics states that the educator "Shall not on the ground of race, color, creed, or national origin exclude any student from participation in or deny him benefits under any program, nor grant any discriminatory consideration or advantage."

The president of the N.E.A., Helen Bain, recently stated:

> The time is now to enforce the "law of the land" by cutting off Federal funds from recalcitrant school districts which refuse to integrate, even if it means a temporary school shutdown. No schooling for a few months is preferable to the kind of degrading and dehumanizing situation which many thousands of children suffer daily in segregated schools . . . Each school district in the nation, in order to receive funds from any present or future Federal assistance program, should be compelled to submit a written statement of its commitment to the goal of "quality integrated education."

The Ohio Education Association is in complete opposition to segregation of schoolchildren on the basis of race, color, creed, or national origin. That opposition was stated clearly in the following resolutions passed by the 1970 Representative Assembly of the O.E.A.:

> The Association believes that quality teaching is the basis of quality education for the boys and girls of Ohio. The Ohio Education Association believes that every child, regardless of race, creed, or national origin, has the inherent right to quality education.
>
> The Association believes in the justice of equal educational opportunity within the state and within the nation with control constantly in the hands of local and state authorities. To this end the Ohio Education Association earnestly supports the board general principles of the Ohio School Foundation Program and the federal laws that will accomplish the same for the nation.
>
> The Ohio education Association encourages local boards of education to employ qualified members of minority groups as professional staff members, as paraprofessionals, and as auxiliary personnel.

> The Ohio Education Association believes that when children and youth develop positive relationships with such persons, their appreciation of our country's cultural and racial diversity will be enhanced.

THE NATIONAL PARENT TEACHER ASSOCIATION.

The following resolution was adopted by the National Parent Teacher Association, May, 1969:

> WHEREAS, The National Parent Teacher Association has resolved in its convention resolution "Equality of Opportunity" (1964) "to put forth every greater effort to assure that our constitutional guarantees of human dignity, freedom, and opportunity will prevail for all children" and has reaffirmed this in its convention resolution "The Rights of Citizens" (1965); and
>
> WHEREAS, in view of the deepening domestic crisis, and in recognition that inequities in education, housing, and employment still persist; therefore be it
>
> RESOLVED that the National Parent Teacher Association continue to develop leadership and programs to promote equal opportunity in education, housing, and employment.

THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS.

The Official Platform of the American Association of School Administrators states:

> As educators we believe –
>
> 1. That the primary purpose of education in the United States of America is the development of each individual for the fullest participation in the American democratic way of life.
> 2. That universal free education must be made available to all peoples of every race, color, and creed

in the interests of intelligent citizenship, world understanding, and peace.

3. That the American democratic way of life can be perpetuated (a) through universal free education which provides equal opportunities and is fitted to the abilities, interests, and needs of each person and of the society in which he lives.

• • •

In order that these principles may be realized, we, as school administrators, propose to work for —

• • •

8. The elimination of barriers that present full access to equal educational opportunity for all children and the provision of educational leadership in eliminating discrimination against any segment of our society.

THE NATIONAL SCHOOL BOARDS ASSOCIATION.

The National School Boards Association adopted the following resolution during the NSBA Delegate Assembly at Miami Beach, Florida, April 12-15, 1969:

> The National School Boards Association urges that state school boards associations initiate and support, in cooperation with other responsible state-wide associations, continuous study and action programs to improve state laws related to the twofold task of raising and distributing tax revenue for public education. The solutions evolved should reflect concern for:
>
> a. programs designed to meet the education needs of all public school children.
>
> b. state aid formulas that compensation for such factors as:

(1) The disparity among school districts in resources available for public education.

(2) The disparity among school districts in effort expended.

(3) The disparity among school districts in the cost of providing comparable programs in urban, suburban, and rural areas.

(4) The higher cost of educating those children with exceptional needs of all kinds wherever found.

(5) The extra cost of quality programs.

c. achievement of an appropriate intergovernmental sharing of the cost of public education based on equitable measurement of need, effort, and resources.

d. development of an equitable, efficient tax system that balances the progressive and regressive factors in the various methods of taxation, in order to provide adequate revenue for education without inequitable tax burdens.

THE DAYTON CLASSROOM TEACHERS' ASSOCIATION.

The Executive Committee of the Dayton Classroom Teachers' Association passed the following motion *unanimously* at its April 12, 1971, meeting:

> WHEREAS: The Dayton Classroom Teachers' Association has endorsed the concept of quality integrated education for all Dayton School children, and
>
> WHEREAS: The United States Supreme Court has decreed that equal educational opportunity is an inherent right of all American Citizens, and

WHEREAS: The President of the United States has asserted his intention to enforce these constitutional rights,

THEREFORE BE IT RESOLVED that the Dayton Classroom Teachers' Association Executive Board demand that the Dayton Board of Education enter into negoitations with the United States Office of Education to develop and to adopt a comprehensive student plan that will result in the desegregation of the Dayton Public Schools . . .

Many other individuals, agencies, committees, commissions, associations, public bodies and organizations have taken the same basic stand in this country relative to racial discrimination. The above statements are but a small sample of the movement in American society to assure that the American ideals become reality for all citizens.

THE POSITION OF THE OHIO STATE DEPARTMENT OF EDUCATION.

Section 7.06 of Division One of *Drury's Ohio School Guide* serves as the preamble for the position of the Ohio State Department of Education's position on this issue:

> Laws providing for the education of children are for the protection of the state itself. The primary purpose of the maintenance of a school system is the promotion of the general intelligence of the people constituting the body politic, and thereby to increase the usefulness and efficiency of its citizens, on which the government of society depends.

Members of local boards of education, as lay men and women, often do not have time and opportunity to learn all they should know in order to function effectively in their elected or appointed positions. Consequently, they commonly rely on recommendations made to them by others who are

also very busy, on public opinion, on the news media, and on various other sources for information basic to decision-making. An important aspect of educational mythology in America is the notion of "local control" of public schools. Although local boards of education have rather broad discretionary powers to formulate policy for many of the educational activities in a given geographical area, those powers are *delegated* by the State. When a local board acts, it is acting as an arm of the State. In Ohio this has been explicitly clarified by the Legislature:

> The organization of the public school system of Ohio is by districts, each governed by its own board of education, which districts are organized to promote education and carry into effect the provision of the Constitution in respect thereto.
>
> A school district is a political organization unknown to the Constitution, the mere creature of legislative enactment, and organized *as an agency of the state* in maintaining its public schools, all of its functions being of a public nature. It is merely a geographical division of territory devised for the convenience of its inhabitants, and a mere territorial and political division of the *state* established exclusively for public purposes, and connected with the administration of local government, through a system of local management and control of the public schools. (*Drury's Ohio School Guide*, Section 2.01, italics not in the original.)

We add, parenthetically, that the phrases *de jure* and *de facto* are, in a very real sense, unknown to the Nation's highest court and its consistent interpretations of the Constitution. Neither phrase has been utilized in any Supreme Court decision relative to schools except in Swann et. al. v. Charlotte-Mecklenburg Board of Education et. al. (April 20, 1971), where the phrase "so called 'de facto segregation'" appears. Other terms have been employed such as "dual school sys-

tems," "unitary school systems," "separate but equal," "admission to public schools as soon as practicable on a nondiscriminatory basis," "state enforced discrimination," "equal protection guarantees of the Constitution," "powers to remedy past wrongs," "equitable remedies to repair the denial of a constitutional right," and "to correct . . . the condition that offends the Constitution." The one phrase that has permeated every major Supreme Court ruling on desegregation of schools is "state imposed segregation by race in public schools which denies equal protection of the laws."

> *School districts are agencies of state government. They are created to carry out the constitutional requirement to provide a system of public education.* A school district is a quasi-corporation. It is a political or civil division of the state; it is established as an agency or instrumentality of the state for the purpose of facilitating the administration of government. Education is a government function. *A school district functions in the execution of state government or state policy.* It possesses limited powers. The powers, duties and liabilities of a school district are only such as prescribed by statute. It has not common law powers.
>
> *Since education is a state function, completely under the control of the state legislature,* except as it may be restricted by the state or or [sic] United States Constitution, the legislature may authorize the creation or alteration of school districts as *state agencies* in such manner as it deems advisable. Clearly, however, the legislature cannot directly administer the state educational system. It must create agencies to carry out its policies and must *delegate* to them much of its authority. (Ibid.)

Each member of the Dayton Board of Education either swore or affirmed that he or she would support the Constitution of the United States and the State of Ohio, and that he

or she would faithfully and impartially discharge his or her duties to the best of his or her ability. The Board is a continuing arm of State government, regardless of its constituent membership at any particular point in time.

As the resolution of April 29, 1971, admitted, "the Dayton Board of Education recognizes that unequal educational opportunities for minority students now exist." Inequality of such opportunities, for minority *and* majority students, has characterized the Dayton public school system throughout its history.

Since the Board, *as an agency of state government,* has created the inequality which offends the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative duty to comply with the Constitution; that is, as the Supreme Court has stated, "to eliminate from the public schools all vestiges of state-imposed segregation." The Court added to that remark:

> Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be protected by the remedial measures of *Brown II.* That was the basis for holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated *root and branch.* (*Swann* v. *Board of Education, op. cit.*, Section III; italics not in the original.)

Lest any doubt remain that the Dayton Board of Education has such an affirmative duty, the Supreme Court's own check list is presented here:

> In *Green*, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most

important *indicia* of a segregated system. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

When a system has been dual in these respects, the *first* (italics not in the original) remedial responsibility of school authorities is to eliminate invidious racial distinctions.

* * *

The construction of new schools and the closing of old ones is one of the most important functions of local school authorities and also one of the most complex.

They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.

In the past, choices in this respect have been used as *a potent weapon for creating or maintaining a state-segregated school system.* In addition to the classic pattern of building schools specifically intended for Negro

or white students, school authorities have sometimes since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. (*Ibid.*, Section IV; except for names of court decisions, italics were not in the original.)

The Ohio State Department of Education congratulates the Dayton Board of Education for being the first of the State's large urban school systems to move affirmatively toward elimination of racial isolation and its evil effects. The desire to move beyond just that and to deal affirmatively with economic isolation is even more commendable. As one lady said to the Board in a recent meeting, "if it ever was a time when we need to get together, now is the time."

The State Department of Education presents its suggested alternatives and recommendations to the Dayton schools based on three "realities" of contemporary America:

1. The laws of the State of Ohio as they relate to the Board's duty. ("It is unlawful for a board of education to provide separate schools or classes in the public school system because of the racial origin, creed, or color of the pupils. A superintendent of schools,

and a board of education, has no legal authority to make any distinction because of such matters in the assignment of pupils to schools, or the determination of the boundary lines of school areas. While the discretion of a board is broad, it does not extend to segregation of pupils on grounds of race or color. The repeal of the former law in this state providing for separate schools for colored children clearly showed the intention of the legislature to take away from the boards of education any such distinction between white and colored children.) (*Drury, op. cit.*, Section 7.47.)

2. The Constitutional requirements spelled out in the Supreme Court decisions related to guarantees of equal protection for all American citizens. (In *Swann* v. *Board of Education*, the statement was made: "Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. *At no time* has the Court deviated in the slightest degree from that holding or its constitutional underpinnings.")
3. The lack of opposition to the intent of the Board's resolution of April 29, 1971.

The first two of these realities have been examined at some length previously in this document. Number 3 has also been documented amply. Some members of the currently composed Dayton Board of Education have consistently and persistently pursued a policy of eliminating racial and economic isolation, of equalizing and extending educational opportunities for all children, and of establishing stable, quality, integrated schools. Other members of the Board have been less outspoken in such support for these goals, yet have consistently and persistently denied their opposition to integrated education. Even those who have been less articulate in their positive support for

integration have introduced resolutions to the Board with sections such as the following:

> Be it therefore resolved, that the policy of this 1970 Board of Education shall be as follows:
>
> 1. That every reasonable and constructive means that can be effected will be taken for the ultimate elimination of racial imbalance in our neighborhood schools."

The Superintendent of Dayton's public schools has given unwavering support for accomplishment of these goals, often in the face of devious and outspoken efforts to thwart their attainment. His administrative staff has also supported the quest for such fulfillment of goals. Even one of the most verbal of the Superintendent's staff, the President of the Serving Our Schools committee, stated in an interview reported in the *Dayton Daily News* on April 28, 1971: "I'm never against any kind of change if it proves to be for the betterment of the child in the community, . . . I think the school is run on a philosophy. Changes come under that philosophy. Of course, it's *quality education for all.*" (Italics not in the original.)

Support in the community for quality integrated education is strong. No one denies their support for that goal. At the March 18, 1971, meeting of the Dayton Board of Education a local pastor was called upon by one board member to speak for the East Dayton community. To the entire Board of Education he stated: "We feel that you are hiding behind the vicious smoke screen that we do not want integration. That is not so . . . I totally reject such a statement."

Every voice that has been raised publicly in the Dayton community has expressed support for integrated education. The major obstacle appears to be the selection of methods and strategies for achieving the goal. In view of these positive attitudes and commitments, Ohio laws, and Supreme Court rulings, the following alternatives are suggested. All have

been proposed, discussed, and evaluated by various individuals and groups in the community during the past several years.

ALTERNATIVES FOR REDUCING RACIAL AND ECONOMIC ISOLATION OF PUPILS AND IMPROVING EDUCATIONAL OPPORTUNITIES IN THE DAYTON PUBLIC SCHOOLS.

1. *The Board could choose to do nothing.* The Board could assume the posture that the Dayton School District has done nothing nor has permitted anything to be done which has led to segregation of children. However, the Board has publicly gone on record as desiring quality integrated education and has publicly admitted that the district is guilty of practices which have led to segregation of schoolchildren. The Ohio State Department of Education recommends that the Dayton Board cannot take this stance, but rather that the board has an affirmative duty to correct those practices and policies which offend the Constitution.

2. *The responsibility could be passed to the 1972 Board of Education.* Inasmuch as voters in the Dayton School district will be selecting persons again in November of 1971 to constitute the Board after the year's end, the current Board members may not want to be the individuals who collectively will initiate a legally and morally proper course of action, one based on the most fundamental ideals and principles for which this nation was founded. The currently composed Board could elect to pass the torch and, in effect, abdicate their responsibilities. However, regardless of who occupies the seats, guilt has been evidenced and the corrections must be made.

3. *All incumbent Board members could resign.* Responsibility for achieving the ideals could be returned to the State where ultimately it belongs. Ohio law permits this to occur and specifies the method. "If the board of education of any

city, exempted village, or county school district fails to perform the duties imposed upon it . . . the probate court of the county in which such district is located, upon being advised and satisfied of such failures, shall act as such board and perform all duties imposed upon such board." (Drury, *op. cit.*, Statute 3313.85.)

4. *Delaying tactics could be continued.* The Board, in spite of resolutions and overt commitment, could choose to make only the lightest mandated changes, and to utilize the best legal talent available to resist compliance with constitutional requirements. Other school districts have chosen this alternative, even as Dayton has used similar methods in the past. However, the highest court in the land has stated the constitutional offensiveness of state-imposed segregation of schoolchildren, and persisting delay clearly violates the oath of office of members of the Board of Education in the state of Ohio.

5. *Existing policies could be magnified and expanded.* For example, the Dayton Board of Education could expand the freedom of enrollment policy and pay the transportational costs for those youngsters who elect to make the majority-to-minority transfer. This is permissible as *one aspect* of a comprehensive plan according to the Supreme Court. "In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move." (Swann vs. Board of Education, *op. cit.*, Section V). However, Ohio law "does not grant to pupils the right to select the particular school to be attended within the district of his residence." (Drury, *op. cit.*, Division One, Section 7.04.)

6. *Some racially identifiable schools could be preserved.* All-black and all-white schools may be allowable in certain instances because of residential patterns or because of psychological needs of persons who are willing to pay the costs of such volunteer segregation. If that course is followed, the Board should study carefully Section V, part 2, of the Swann

vs. Board of Education ruling by the United States Supreme Court before making such a decision.

7. *The Board could seek a mandate from the Courts.* For example, the Board could elicit the help of citizens or citizenry groups to prepare a legal suit against the Board as an agency of state government and give to them all of the evidence and help necessary for winning the case in Court. In view of the Board's resolution, however, this does not appear to be a necessity. The Board again is to be commended for attempting to accomplish voluntarily what is legally and morally proper since the Board apparently intends to fulfill its affirmative duty to do more than just remove those vestiges of state-imposed segregation which offend the Constitution.

8. *Elimination, renovation, and construction of buildings could become the major vehicle for accomplishing the goals.* Older buildings *could* be eliminated and newer ones expanded or constructed in areas where, by design, they could easily be integrated racially and economically. Lack of financial resources currently seems to prohibit this alternative from becoming such a vehicle in the near future.

9. *The Board could opt for utilization of the "voucher" plan.* Some monies are available through the United States Office of Education under the so-called "voucher" plan. The Superintendent could be directed to seek such finding and also to ask the Ohio State Legislatures for permission, in effect, to close the public schools and to provide finances for students to select their own facilities for educational experiences. The conflict between Federally sponsored innovative programs and the legislatively imposed duties and responsibilities of school boards in Ohio seems to preclude this alternative as one that merits serious attention.

10. *The Board could require racial balance of students in each school.* Through the legally binding contract negotiated between the Dayton Board of Education and the Office for Civil

Rights, each school's faculty will be composed of approximately the same proportion of black to white as characterizes the entire system. With slight modifications, that was the policy adopted by the Board of Education in Charlotte-Mecklenburg, North Carolina, for both faculties and students. And, quite legally, any board of education could adopt such a policy. At least four factors suggest this to be an unreasonable alternative for the Dayton school district:

a. The United States Supreme Court, in Swann vs. Board of Education, stated: "The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

b. Although exact mathematical formulas may be easy to derive and even to implement, they are very difficult to maintain. Unforeseen events such as population movements, accidental or deliberate destruction of buildings, changes in rates of student attrition, or development of attractive private schools can easily turn the school administrator's role into a very difficult one if racial balance of students becomes the system's policy.

c. The financial costs of exact racial balance could become prohibitive, especially if additional transportation is required.

d. The Supreme Court again has stated: "An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significanctly impinge on the educational process." (*Ibid.*)

11. *The Board could adopt as policy the "parameters" concept.* During December of 1970 a series of three study sessions was held between the Dayton Board of Education, the administrative staff, and other invited personnel. In one section of the document entitled *Integrated Education* produced

for those sessions an approach to strategies for accomplishment of these goals was recommended: "Parameters and the Future." The purpose of that presentation was to recommend changes in the Dayton School District's organization that were designed to improve the quality educational experiences and to equalize and to extend opportunities for those experiences.

After searching for, cataloguing, and examining the other alternatives described above, the Ohio State Department of Education officially recommends to the Dayton Board of Education the basic ideas employed in development of "Parameters and the Future" as the most reasonable and educationally sound of those policies which the Dayton Board could adopt. If that posture is assumed by the Dayton Board of Education, acting as an agency of Ohio State Government, a comprehensive plan can then be developed for implementation of the policy which will be constitutionally valid and inoffensive, educationally sound, and morally proper. An overview of such a plan is presented here; details, of necessity, can be developed only after the Dayton Board of Education has officially decided its course of action.

AN OFFICIAL RECOMMENDATION TO THE DAYTON BOARD OF EDUCATION FROM THE OHIO STATE DEPARTMENT OF EDUCATION FOR REDUCING RACIAL AND ECONOMIC ISOLATION OF PUPILS AND IMPROVING EDUCATIONAL OPPORTUNITIES IN THE DAYTON PUBLIC SCHOOLS.

Basic assumptions. This document is presented on the following basic assumptions:

1. That many of a child's most important lessons are learned very early in life, especially those affective learnings which shape values, attitudes, appreciations, interests, and aspirations;

2. That students in the Dayton public schools are living and learning in a community that currently is characterized by social and geographical insulation and isolation as these relate to race and economy. This results in a form of cultural conditioning that impedes and restricts inter-racial understanding, appreciations, and cooperation;

3. That schools, as suggested by the United States Supreme Court, cannot be separate and equal. More importantly, children isolated racially and economically in schools cannot learn the most essential lessons needed for effective participation in a democratic society;

4. That as occupational opportunities are expanded for persons who previously have been economically restricted, other national goals such as increased vocational opportunities and open housing will be accomplished. Yet, the schools cannot wait on other agencies of government and societal institutions; educational institutions, by a series of legal and judicial thrusts, have been positioned on the front edge of social change. If the schools' leadership fails, both white and black neighborhoods are apt to become "embalmed ghettoes;"

5. That the occupational, political, social, and higher educational world to which Dayton's young people will graduate will be one in which inter-racial experiences are commonplace and ordinary;

6. That the problems inherent in racial and economic isolation cannot be solved unless an appreciable proportion of minority children are involved, whether they be black in previously all-white schools, or white in previously all-black schools;

7. That in order for any intermediate steps to be successful, commitment to the final goal of ending racial and economic isolation and insulation is essential;

8. That if the schools' task of preparing young people appropriately and adequately for adulthood is to be achieved in Dayton, racial and economic isolation and insulation in the public schools must be eliminated root and branch, and

9. That a plan should be designed (1) to improve the quality of educational experiences as the opportunities for educational experiences are equalized and extended; (2) to eliminate racial and economic isolation and insulation as completely as possible; (3) to involve all facets of the total educational enterprise in pursuit of a common goal; (4) to provide opportunity for involvement in the decision-making process to those persons most directly affected by the changes which result; and (5) to provide for future planning and development that will minimize the possibilities of racial and economic isolation and insulation redeveloping.

Factors influencing a comprehensive plan. Plans designed to eliminate racial and economic isolation and insulation in the Dayton School District must take into account the following factors:

1. With few, if any, exceptions currently existing school building are structurally sound and usable.

2. A practically impenetrable residentially segregated living pattern of blacks and whites exists in the school district.

3. About 80 per cent of all black students reside in the area bounded by Wolf Creek on the North and the Miami River on the East. The residential districts North, Northeast, and due East of this area are almost 100 per cent white, with the exception of the changing Dayton View neighborhood immediately north of Wolf Creek.

4. Attitudes of polarization and separatism apparently are

growing among some black and some white segments of the population;

5. Recent school elections, tax levies, and bond issues seem to indicate an extremely conservative community attitude in some sections of the city.

6. The ideals and commitments which are deeply embedded into the American way of life by the Constitution of the United States, by Congressional enactments, by Executive decrees, and by Judicial decisions.

7. The potential impact that decisions made in 1971 will have on longer ranged plans and the future of public education in the Dayton Metropolitan Area.

8. The affirmative duty that the Dayton Board of Education, as an agency of state government, has to correct inequities from the past and to preclude the possibility of similar inequities developing in the future.

Criteria for educational development. For practical reasons, future educational developments in Dayton should be made in view of the following criteria:

1. For budgetary reasons, a feasible plan should require a minimum of school plant conversion.

2. For the same reasons, transportation costs and the time involved in transportation should be minimized.

3. School developmental plans should provide for full opportunities for leadership and extracurricular experiences for all pupils.

4. Plans to eliminate racial and economic isolation and insulation should also incorporate components which can take advantage of public transportational patterns.

5. Plans to eliminate racial and economic isolation should provide workable parameters within which to operate.

These parameters should reflect the assumption that an appreciable number of minority children are involved in all of the schools.

Components of the plan. Improvement of educational quality and elimination of racial and economic isolation in schools are a series of interrelated processes that involve all aspects of the educational process. Deliberate planning in many areas is essential to success, and success has to be planned for and built into the plans. The major components included here are:

1. Community involvement.
2. Students
    a. Elementary schools
    b. Middle schools
    c. Secondary schools
3. Teaching faculties
4. School staffs
5. Central Office staff
6. Curriculum
7. In-service development
8. Staff recruitment
9. Buildings and facilities
10. Finance

Stages of implementation. If simple mixing of physical bodies as a means of satisfying social and political pressures had been the intent of the Dayton Board of Education, development of a plan for achieving that goal would have been an easy task to be accomplished in one fell swoop. However, improving the quality of education, eliminating racial and economic isolation and insulation, unifying efforts in pursuit of a common goal, involving persons affected by changes in decision-making, and minimizing possibilities for isolation and insulation to redevelop are not easy tasks nor can their achievement be a simple one-step process. Several stages of implementation should therefore be expected.

Methods. The means, strategies, methodologies, and techniques whereby the goals subscribed to in this document can be achieved are limited only by vision, imagination, commitment to quality in education, and concern for children. No one method could begin to accomplish these goals, and any one method independent of others would at best be tokenism.

The recommendation is made here that a wide variety of citizens, teachers, learners, and facilitators of learning be invited to discuss and to recommend methods to supplement those suggested herein.

Quality education has sometimes been interpreted as a learner sitting at the feet of a master teacher and receiving knowledge and wisdom from that master teacher. A more realistic view of quality education, one supported by a century of experimentation, research, and study indicates that youngsters learn through transaction with all components of the educational environment. The Dayton Public Schools have to some extent been committed to this latter view. Some of the environmental components might be illustrated by the diagram on the following page.

A plan for Dayton's schools compatible with the preceding sections of this document ought also to be based on these premises:

1. That each child should have access to the best teachers available;
2. That many of the most important lessons essential for participation in a democratic society are those which youngsters learn through transactions with other students;
3. That physical facilities exert notable influence on learning;
4. That accessibility to unbiased learning materials is es-

sential to improvement in quality of educational experience;

5. That curricular development must be a continuing process influenced by national goals, community needs, individual aspirations, and sound learning theory;

6. That when the school and the community harmonize their efforts, the potential for improvement of educational quality is best enhanced; and

7. That maximum learning achievements can be expanded for all children as efforts are made to provide better education for previously disadvantaged children.

Community Involvement. This document recommends for future educational planning that the people who comprise the greater Dayton community be involved more than they have been previously in the activities of the schools. Current efforts can be expanded and innovative practices can be implemented.

The following recommendations are made specifically for immediate implementation if this plan is adopted as policy by the Board of Education:

1. A community advisory committee be established to be composed of the wide range of persons suggested in the April 29, 1971, Board resolution.

2. The community advisory committee be asked specifically to perform the following task: to establish dialogue with the citizens they serve in the community as a means of eliciting suggested methods for implementing those facets of the plan which involve:

   public relations
   community support for the schools
   elimination of racial and economic isolation in all white and all black neighborhoods,
   promotion of good human relations in the schools, and
   coordination of social action between school and community

3. The Citizen's Advisory Councils for each public school in Dayton be requested to sponsor open forums to elicit recommendations from parents and other citizens for methods of implementing pertinent facets of this plan.

4. The Community Advisory Committee and the Citizens Advisory Councils be asked:

   a. to report their initial recommendations to the Superintendent of Schools no later than six weeks after appointment of the Advisory Committee; and

   b. to report recommendations that relate to longer ranged goals established by the Board no later than six months after appointment.

5. The Superintendent of Schools be charged with the responsibility of:

   a. reporting within one week after Board adoption of suggested policy to the citizens of the Dayton area *via* television, radio, the press, and other media the essential components of this plan; and

   b. requesting that other citizens who are willing to offer suggested methods for implementation of the plan submit their suggestions to the Superintendent's office by postal service within one month after Board adoption.

6. Recommendations received from these groups and organizations for implementation of the plan be channeled by the Superintendent to appropriate school authorities and study committees for evaluation and possible incorporation.

Other Components of the Recommended Policy. The document, *Integrated Education*, introduced to the Dayton Board of

Education in December, 1970, included an outline of the other components of the recommended policy. Repetition here is not necessary. However, the following activities and goals are stated explicitly as part of this formal set of recommendations.

1. Any change in the racial and economic composition of a given school's student population between the date that this document is received and September, 1971, should be toward reduction of racial and economic isolation, or toward the system-wide proportion of black to white and affluent to poor.

2. Any additional methods deemed educationally sound and economically feasible by the Superintendent and his staff which can reduce racial and economic isolation should be implemented.

3. By no later than September of 1972 the student racial composition of each of Dayton's public schools will be within the general parameters of fifteen per cent plus or minus the averages of black students in the elementary, middle, and high schools. (Judge James B. McMillan stated in Swann vs. Board of Education: "The assumption . . . that a school is desegregated when it has as many as 10 per cent of a minority race in its student body is not accepted by the Court, and neither the Board nor the Court should be guided by such a figure." The United States Supreme Court upheld his view unanimously.)

4. A team of outside consultants with appropriate experimental backgrounds should be invited to review:

   a. all existing policies of the Dayton Board of Education to determine their appropriateness for an economically and racially integrated school system and to make recommendations for needed changes in those policies;

   b. all existing administrative procedures of the Dayton school system to determine their appropriateness for an economically and racially integrated school system and to make recommendations for needed changes in those procedures; and

   c. all handbooks, directives, and administrative procedures being utilized in individual schools to determine their appropriateness for economically and racially integrated schools and to make recommendations for needed changes.

5. The administrative staff, in conjunction with outside consultants, should continue to develop and to have ready as soon as possible proposals for obtaining funds to help finance implementation of this comprehensive plan. Such proposals should be developed for possible acquisition of funds from a wide variety of sources including, but not limited to, the Federal government.

6. The divisions and apparent animosities which have characterized many of the activities of the Dayton Board of Education in the recent past should be placed aside, and, as an arm of the Ohio State government, the Board should move immediately and affirmatively to adopt as policy and to order implemented into practice this recommendation for achieving the goals stated in the Board's resolution of April 29, 1971.

7. On January 15, 1971, a request was presented to the Ohio State Department of Education from the Dayton school district for consultation and assistance in reorganizing the system to include middle schools. A set of recommendations from the Ohio State Department of Education relative to that request was transmitted to the Dayton school district along with a letter dated March 12, 1971. On page 5 of those recommendations, under Alternative 5, section f, the following statement appeared:

> In areas of the school district where surrounding housing patterns are racially segregated, any set of schools involved in the conversion process should be designated as "magnet" schools and at least fifteen (15) per cent of the classroom and other space and facilities of the schools should be reserved for voluntary transfers by minority students as the administration may deem necessary to relieve overcrowdedness or to implement programs designed to meet special needs.

That particular recommendation apparently was ignored by the Dayton Board of Education. Of the five sets of schools currently involved in the process of conversion to feeder and middle schools, the following seems to be occurring:

1. two sets of schools will be totally black;
2. racial isolation will actually be increased in one set of schools; and
3. only in the Dayton View area, which was previously integrated, could conversion to middle schools possibly result in reduction of racial and economic isolation and insulation.

If what appears to be happening with middle schools is in fact happening, then Dayton has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur.

This report concludes with statements made recently by three men who won the governorships of states in the South. James Earl Carter, Jr., 76th Governor of George, said: "I say to you quite frankly that the time for racial discrimination is over. Our people have already made this major and difficult

decision. No poor, rural, weak, or black person should ever have to bear the additional burden of being deprived of the opportunity of an education, a job or simple justice."

On January 17, 1970, the first Republican Governor in nearly a century said in his inaugural address to the people of Virginia: "Let the goal in Virginia be an aristocracy of ability, regardless of race, color, or creed."

In Arkansas, Dale Bumpers' avowed reason for entering the gubernatorial race was to prevent segregationist and former governor Orval Faubus from regaining office. He asked, "How could I face my children and grandchildren if I allowed that to happen without a fight?"

The Dayton Board of Education again is to be commended for the action it is taking an affirmative stand to correct segregation which has been imposed on schoolchildren in the district. Accomplishment of the goals will not be easy. Defeat is possible if strength falters or if commitment fails. Governor Bumpers' statement can be paraphrased for the Dayton Board of Education: "How could you face your children and grandchildren if you allow that to happen?"

Finally, the Ohio State Department of Education recommends that the model for staff, student, and community development currently being planned for *Project Emerge* in the West Dayton area become the pattern for the entire district. Only two components of that model are presented here (staff and community) since final development of the third component must await action by the Dayton Board of Education relative to integration of students. A preliminary outline is attached to this set of recommendations.

PLAINTIFFS' EXHIBIT 13A

Mr. Robert Kline, Chairman
Board of Education, City of Dayton
348 W. First Street
Dayton, Ohio 45402

Sir:

In May, 1954, the Supreme Court of the United States held, in the now historic Brown vs. Kansas City School Board case, that . . . "to separate them (Negro Children) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal."

Within the City of Dayton, those schools located in the area bounded on the North by Wolf Creek, on the South by Nicholas Road, on the East by the Great Miami River, and on the West by Oberlin and Elkins Avenues are as "segregated" *in fact*, as they would be under the force and effect of the law. Further, all of the debilitating effects of the "separate but equal" school system of the Southern states exist and accrue to the permanent disadvantage of the predominantly Negro students of the schools in the above area.

In the 10 year period since the Supreme Court Ruling, there has been a marked absence of any definitive action or program by the Dayton School Board to abolish segregation in the City's schools. In fact, the observable actions of the school board have solidified the patter of segregation. The locating of the new Dunbar High School in the middle of one of the worst "slum areas" in the United States and in an all-Negro school district is a case in point. More recently, the construc-

tion of McNary Elementary School in an all-Negro community can only be interpreted as a deliberate plan on the part of the school board to perpetrate segregation in Dayton's schools.

We are aware of the fact that housing segregation contributes to school desegregation. But the opposite is also true. White Suburbia could become integrated if school boundaries were redrawn to include Negro residents.

Analyses and rationalizations which justify maintaining the status quo are no longer acceptable. The problem can no longer be dismissed with a glib answer. Negro parents and Negro students demand changes. School segregation, whether de facto or de jure, permanently handicaps the Negro.

The problem is intricate and complex and there are no simple solutions. The responsibility is clearly yours to find solutions. What action are you taking, and what plans have you formulated to solve this problem? The upgrading of teachers and facilities within the segregated schools (and there is no evidence of even this) is not a satisfactory long term solution since "separate" never really becomes "equal."

We invite the urgent attention of the entire board and administrative officials to this matter and request your prompt reply concerning your proposed plan of action.

Dayton Alliance for Racial Equality

Charles E. Tate, Chairman
529 Gramont Avenue
Dayton, Ohio 45407

cc to:
Mr. Robert French

PLAINTIFFS' EXHIBIT 13B

[LETTERHEAD OF THE DAYTON PUBLIC SCHOOLS]

October 19, 1965

To: Members of the Board of Education
From: Robert B. French, Superintendent

At the recent meeting of City School Superintendents in Memphis, the chief topic of discussion centered around the encroachment of the federal government in local schools. Four cities have been warned that they are in violation of the Civil Rights Act, but these cities have been unable to find out in what way they are in violation. These cities feel that they have been found guilty by the press and television and have had no chance to answer allegations. The Commissioner of Education, when asked to give guide lines for integration, was unable to do so except to say that he would expect new construction to be so placed that it would facilitate integration.

Another subject of considerable interest was the growing militancy of teachers' organizations and their tendency to want to deal directly with the Board of Education in all matters.

The most talked about type of school organization for the future is the Kindergarten-4, 5-8, and high school 9-12.

Jack Crowther, Superintendent at Los Angeles, gave a graphic account of recent riots and how the schools coped with the situation.

Memphis is one of the modern southern cities. It has experienced rapid growth and construction is going on on all fronts. They have recently completed a 40,000 seat stadium, large field house and a modern Board of Education building, housing one of the most sophisticated data processing systems in the country.

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PLAINTIFFS' EXHIBIT 13N

[LETTERHEAD OF NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE]

November 15, 1954

Mr. Robert B. French,
Superintendent of Dayton Public Schools, and
Members of the Dayton Board of Education
232 North Main Street
Dayton 2, Ohio

Dear Mr. French and Board Members:

Some months ago, the Dayton Branch of the National Association for the Advancement of Colored People, requested that you re-examine the patterns of segregation that existed in our Dayton schools in the light of the May 17th, Supreme Court decision out-lawing segregation in public schools.

This request was not made exclusively for any special benefit that would accrue to the Negro child or teacher as such, but rather on an over-all benefit to all Dayton, in that our great City, who has demonstrated time after time that it could meet and conquer any industrial or community challenge; can also meet the challenge hurled at our City by our Supreme Court when it unanimously said: "We have now announced that segregation is a denial of equal protection of the law. Segregation which separates them from others of a similar age and qualification solely because their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone."

Chester Bowles, ex-Governor of Connecticut, and former Ambassador to India said, "The question asked over and over from Lebanon to Japan by two-thirds of our world's population: Its racial discrimination against your own colored citi-

zens. The colored peoples of the world simply cannot think about the United States without considering bitterly the limitations under which 15,000,000 Americans with colored skins are living. Mr. Bowles went on to remind us that just recently Secretary of Defense Charles E. Wilson whose business genius Dayton and the world reveres and respects, ordered an end to all segregation of school children on all U. S. Military posts by September 1, 1955. It is interesting to note that all segregation in the United States Army has ended ahead of schedule. Mr. Bowles goes on to say: Moreover, any fair minded student of the facts must agree that the inability of the South to solve fully its profoundly difficult problem is no worse than the inability of the rest of the Country, under far easier circumstances to clear up its own shoddy record.

To those of you who may think that the American Negro is impatient, we would like to remind you that on January 1, 1963, we will celebrate 100 years of emancipation. How far we will have come by the close of that century toward full freedom for all Americans? Any great change takes time, but 100 years is a long, long time. In these days, it seems long enough to accomplish almost anything. A century ago, half the world was dominated by European masters, our Pacific west was being opened to settlement. Free compulsory public education was still a new and questionable proposition, the automobile, airplane, and mass production, which have remade our world was unknown. Looking back, the changes and achievements are breath-taking.

If all this can be done in one century, surely 100 years is time enough to see that American Negroes receive the full rights and dignity to which every man is entitled under a democratic government.

The Dayton Branch of the National Association for the Advancement of Colored People, wishes to request again that in view of the indisputable facts that segregation in school membership and teachers does exist in our Dayton School System, and that Washington D. C., and that even many

other Southern states have taken steps to abide by the decree of the Supreme Court decision, that it does appear that the Dayton Board of Education would give due consideration to plans that would end this un-American school segregation. It is our studied opinion that Dayton, as we have stated before, who has so gloriously met challenges of floods, city income tax issues, and slum clearance, would be glad to join and support you in a program that would show that we in Dayton can solve by a democratic method a dee-rooted injustice quickly and peacefully.

The National Association for the Advancement of Colored People reminds the Dayton Board of Education finally of the words of Alan Paton, author of "Cry The Beloved Country, As America accepts the Negro more and more fully, will the strength be poured into herself, so that she can play more surely her role in the world?"

Sincerely yours,

/s/ CHARLES J. FRANCIS
President
Dayton Branch, NAACP

/s/ MILEY O. WILLIAMSON
Executive Secy.
Dayton Branch, NAACP

PLAINTIFFS' EXHIBIT 15A

DAYTON PUBLIC SCHOOLS

Roosevelt-Colonel White Optional Area Enrollments, 1963

Colonel White

Students from Roosevelt-Colonel White optional area attending Colonel White, 1963:

White	361
Black	6
	367*

Racial composition of Colonel White High School, 1963:

White	98.9%
Black	1.1%

Roosevelt

White seniors from Roosevelt-Colonel White optional area attending Colonel White, 1963:

White	3**

---

* In 1963-64, 6 of 367 students who lived in the optional Colonel White/Roosevelt district and chose to attend Colonel White were black students. The following sources were used to gather this information: 1) The Colonel White High School directory for 1963-64; 2) Alphabetical list of streets in Colonel White High School district; and 3) Senior class composite pictures for 1964 through 1967. Each address in the directory was checked against the alphabetical list of streets to arrive at the number of students attending Colonel White and living in the optional area. Black students were identified from the composite. It was found that 6 lived in the optional area, 2 lived at Shawen Acres and 3 lived in the Colonel White only district.

Plaintiffs' Exhibit 15A

Racial composition of Roosevelt High School, 1963:

White	5.5%
Black	94.5%

COLONEL WHITE HIGH SCHOOL

Students from Roosevelt-Colonel White Optional Area Enrolled at Colonel White, 1963-64

Seniors	49
Juniors	87
Sophomores	95
Freshmen	136
Total:	367

From composite class photographs 6 of the black students at Colonel White in 1963 were from the optional area.

Source: Colonel White Student Directory, 1963-64.

Racial Composition of Colonel White High School, 1963-64, 98.9% white, 1.1% black. Racial Composition of Roosevelt High School, 1963-64, 94.5% black, 5.5% white.

** In the senior class picture of 1963, there are three white students who were attending from the optional area between Roosevelt and Colonel White: Donna Creager, 605 Ferguson Avenue; Larry Glascow, 1810 W. Riverview; and Jerry Porter, 104 Salem Avenue. The number of whites in the senior class of succeeding years is: 1964 . . . 9; 1965 . . . 2; 1966 . . . 3; and 1967 . . . 0.

PLAINTIFFS' EXHIBIT 15A1

OPTIONAL AREA ROOSEVELT-COLONEL WHITE STUDENTS ATTENDING COLONEL WHITE

Year	Students Living in Optional Area	Blacks	Whites
1957-58	Information impossible to obtain under time		
1958-59	limitations; no student directories available.		

The following information obtained from student directories and teachers.

1959-60	188	2	186
1960-61	286	2	284
1961-62	306	2	304
1963-64	366	6	360
1968-69	407	216	191
1969-70	354	245	109
1970-71	373	298	75

ROG:mh

PLAINTIFFS' EXHIBIT 15B1

DESTINATION OF HAWTHORNE EIGHTH GRADERS RESIDING IN COLONEL WHITE – KISER OPTIONAL AREA

	To Col. White	To Kiser	To Other
1962-63	15	6	
1963-64	21	2	
1964-65	22	18	
1965-66	not determined	not determined	
1966-67	not determined	not determined	
1967-68	14	27	0
1968-69	7	16	4 (Patterson)
1969-70	1	24	5 (Patterson)
1970-71	5	15	2 (Patterson)
1971-72	0	20	4 (Patterson)

All students are white

SOURCE: Hawthorne School, High School Destination Record Book

PLAINTIFF'S EXHIBIT 16B

GUIDELINES FOR FREEDOM OF ENROLLMENT DAYTON PUBLIC SCHOOLS

The Freedom of Enrollment Program is available to any student residing within the Dayton Public School District. This Enrollment Policy became effective September 1969. The provisions of Freedom of Enrollment are:

No student will be moved from the regular school unless the student and parent request a transfer.

Transfer requests will be honored only if the requested school has available classroom space.

Students who cannot obtain a required course in the school of attendance will be given priority for transferring to a school where that course is offered.

Transfers other than for special courses, must improve the racial balance in the receiving school.

Any two students or numerically equal groups can exchange places if the exchange improves the racial balance in the receiving schools.

Transfer to another school within the city may be made at the beginning of a semester. The student agrees to attend the receiving school for the entire school year, provide his own transportation, and adhere to standards and regulations of the receiving school.

I. PROCEDURES PRIOR TO SUBMITTING APPLICATIONS TO THE DEPARTMENT OF PUPIL PERSONNEL

An application for transfer may be obtained from and submitted to the principal of the home school district.

All requests for transfer shall be forwarded by the principal to the Department of Pupil Personnel for action.

The principal or a designated person should explain the provisions of Freedom of Enrollment to students or parents (as stated above).

All applications are dated when received by Pupil Personnel to establish priority when classrooms are closed due to increased enrollment.

Parents or guardians should be encouraged to sign application in the presence of a school official to verify approval of transfer.

The principal of the sending school must sign the application. The signature of the principal denotes the student is in good standing (attendance, conduct and achievement) and is being recommended for transfer.

If a student is requesting a specific subject which is *not* offered in his home school of attendance, a check should be made by the sending school to determine if desired subject is being offered.

PLAINTIFFS' EXHIBIT 16C

February 28, 1972

Mr. William Stover
Principal
Kiser High School
Dayton, Ohio

Dear Mr. Stover:

Thank you very much for your letter of February 22 concerning Freedom of Enrollment transferees to your school at the beginning of the second semester.

I like your suggestion concerning the possibility of an orientation program for Freedom of Enrollment students going into a new school. Through a copy of this letter to Mr. Carroll, I

Plaintiffs' Exhibit 16C

will ask that he investigate such a procedure so that a smoother transition may be made by some of the students in the future.

As you are aware, the assignment of students under Freedom of Enrollment is based upon either the criterion of a special course not offered in the home school, or improvement of the racial balance in the receiving school. Additionally, however, it is necessary for the principal of the home school to certify that the student in question is in good standing. It seems to me that this is a professional responsibility placed upon the school principal and that it should not be necessary for central office personnel to review the record of every applicant. Consequently, I think that perhaps high school principals should discuss among themselves just what criteria should be used to define "good standing" and adopt guidelines that Mr. Carroll's office could follow. I should be most happy to discuss this matter further with you or with the principals themselves.

As to the matter of athletic eligibility, I think the sad fact is that we have learned from this experience. I cannot go along with the idea of declaring a student ineligible for one year from the date of his transfer since the Freedom of Enrollment policy itself is designed to encourage transfer. However, I do feel that a student participating in inter-scholastic activities in basketball, wrestling and gymnastics who transfers at mid-year should lose his eligibility in that sport for the remainder of that year. I have communicated my feeling about this to Mr. Marquardt and hope that I may be invited to the next Athletic Board of Control meeting when this particular problem is discussed.

Thanks for your letter. I certainly appreciate your ideas and comments.

Sincerely,
William H. Goff

WHG:jac
cc: Mr. Herbert Carroll
Mr. David Carter
Mr. William Marquardt

PLAINTIFFS' UNMARKED EXHIBIT

[LETTERHEAD OF THE DAYTON PUBLIC SCHOOLS]

May 18, 1970

Dear Parents:

As you know, last September individual transfers were authorized from Roth High School to several other high schools in the Dayton district as a result of physical assault and intimidation in the Roth area. Since that time, the situation has improved substantially to the point that the physical safety of students is reasonably secure.

This letter is to advise you that it will now be necessary for your son or daughter to attend Roth High School for the 1970-71 school year. At the end of school in June, transfers will be issued and records forwarded to Roth from the school which the student now attends.

If you have any questions about this move, please feel free to contact me at the Board of Education, 461-3850.

Sincerely yours,

/s/ WILLIAM H. GOFF

WHG/cf

Emergency Transfers from Roth

NAME	GRADE	SCHOOL ASSIGNED
Brickles, John	9	Meadowdale High
Combs, Gary	9 Spec.	Stivers High
Crowley, Loye	9	Stivers High
Davis, Marvin	10	Stivers High
Day, Stephen	9	Meadowdale High
Dennison, Catherine	9	Stivers High

Dennison, Steven	9	Stivers High
Howard, Billy	12	Fairview High
Howard, David	9	Fairview High
Howard, Larry	10	Fairview High
Howard, Nadine	10	Fairview High
Humphrey, Raymond	9	Meadowdale High
Jones, Linda	9	Meadowdale High
McPherson, Gerald	10	Meadowdale High
Metcalf, Steven	9	Stivers High
Noe, Dwight	10	Belmont High
Ongell, James	11	Stivers High
Pelfrey, Brenda	12	Stivers High
Rader, Larry	10	Meadowdale High
Rogers, Darlene	9	Kiser High
Spencer, Amos	11	Meadowdale High
Smith, Bernie	9	Meadowdale High
Warner, Susan	11	Kiser
Wilson, Charles	9	Meadowdale High
Wilson, Deloris	11	Fairview High
Jones, Archie	11	Meadowdale High
Fielder, Robert	10	Stivers High
Fielder, Beverly	9	Stivers High
Maiden, Jerry	8	Drexel
Maiden, Robert	9	Stivers High
Hutchinson, Larry	9 Spec.	Meadowdale High
Philbeck, Paul	11	Meadowdale High
Partridge, James	8	Gardendale
Plemons, Billy M.	9	Meadowdale High
Joiner, Joy Sue	9	Kiser High
Ziegler, Darlene Sue	9	Kiser High

October 3, 1960

Mr. Arne Holmbo
Principal, Roosevelt High School
Dayton, Ohio

Dear Mr. Holmbo:

A limited number of Negro children from Prince Edward County, Virginia, have been brought to Dayton and placed in foster homes in order that their education may be continued. We have agreed to accept approximately ten of these students in the Dayton schools for the coming year tuition free. Three of these students are now enrolled in Roosevelt High School and their names are at the bottom of this letter.

I am enclosing a copy of a letter from the American Friends Service Committee giving additional information relative to this project. Possibly other members of your administrative staff should have an opportunity to read this letter.

Very truly yours,

B. H. Armstrong
Director of Pupil Personnel

BHA:tr
2 Enclosures

Walter Barksdale, 2033 Howell Avenue, Dayton 7, Ohio.
Charlie Bolden, 3610 Lakeside Drive, Dayton 8, Ohio.
Willie Bolden, 925 Eleanor Avenue, Dayton 8, Ohio.

Plaintiffs' Unmarked Exhibit

October 4, 1960

Mr. Robert P. Smart
Principal, Nettie Lee Roth High School
Dayton, Ohio

Dear Mr. Smart:

A limited number of Negro children from Prince Edward County, Virginia, have been brought to Dayton and placed in foster homes in order that their education may be continued. We have agreed to accept approximately ten of these students in the Dayton schools for the coming year tuition free. Two of these students are now enrolled in Roth High School and their names are at the bottom of this letter.

I am enclosing the copy of a letter from the American Friends Service Committee giving additional information relative to this project. Possibly other members of your administrative staff should have an opportunity to read this letter.

Very truly yours,

B. H. Armstrong
Director of Pupil Personnel

BHA:tr
Enclosure

Anna Barksdale, 805 Walton Avenue, Dayton 17, Ohio
Mattie Paige, 4180 Sylvan Drive, Dayton 17, Ohio

Plaintiffs' Unmarked Exhibit

August 19, 1970

Mr. Chester Gooding, Principal
Stivers High School
Dayton, Ohio

Dear Mr. Gooding:

Your concern about four students formerly from the Dunbar area has been duly noted and their records have been reviewed. It would appear that four students, Darlene Arnold, David Arnold, Darlene Claybourne, and Michael Jamison should not be returned to Stivers High School on the basis of poor attendance and behavior and failure in classroom work.

I shall ask Mr. Hart, Visiting Teacher, to process the two boys for assignment to the Continuing Education Program. Placement of Darlene Claybourne and Darlene Arnold will have to await a parent conference.

Sincerely yours,

William H. Goff

WHG/cf

cc – Mr. George Findley, Principal, Dunbar High School
Mr. Denis Hart, Visiting Teacher

Plaintiffs' Unmarked Exhibit

Emergency Transfers from Stivers

NAME	GRADE	SCHOOL ASSIGNED
Tomlin, Lionel	11	Dunbar High
Mann, Steve	9	Dunbar High
Thomas, Patricia	9	Dunbar High
Casey, Guy	9	Dunbar High
Tucker, Harold	9	Dunbar High
Cooper, Darlene	9	Dunbar High
Cooper, David	9	Dunbar High
Hill, Peter	9	Dunbar High
Mattison, Randall	9	Dunbar High
Robinson, Raymond	9	Dunbar High
Miller, Lee	9	Dunbar High
Jamison, Michael	9	Dunbar High
Kimbrough, Helen	9	Dunbar High
Bryant, Donald	9 spec.	Dunbar High
Perdue, Diane	9	Dunbar High
Boyd, Donald	9	Dunbar High
Anderson, Debra	9	Dunbar High
Jones, Rudolph V.	9	Dunbar High
Claybourne, Cassandra	12	Dunbar High
Claybourne, Gary	10	Dunbar High
Claybourne, Darlene	9	Dunbar High
Porter, Richard	9	Dunbar High
Austin, Ronald	9	Dunbar High
Knox, Curtis	11	Dunbar High
Knox, Wayne	9	Dunbar High
Roberts, Delores	9	Dunbar High
Bush, Charles	9	Dunbar High
Bush, Theresa	9	Dunbar High
Mock, Edward	9 spec.	Dunbar High
Sanders, Diane	9	Dunbar High
Turner, Lenore	9	Dunbar High
Broyles, Junette	9	Roosevelt High
Mack, James	9	Roosevelt High
Mack, Tyrone	9	Roosevelt High

Plaintiffs' Unmarked Exhibit

March 5, 1956

Mr. Walter E. Stebbins
Superintendent, Mad River Township Schools
Mad River Elementary School
1830 Harshman Road
Dayton 4, Ohio

Dear Mr. Stebbins:

In our recent phone conversation, I believe you advised me that you had approximately one hundred forty-two (142) 8th grade pupils to be served in the Dayton Public Schools in the 9th grade this fall at Stivers or Wilbur Wright. Sixty-two (62) of these pupils are now in your Page Manor School and eighty (80) are in Harshman and Overlook. We suggest that these pupils be divided between Stivers and Wilbur Wright according to the policy used in September, 1955. This would mean the sixty-two (62) Page Manor pupils would attend Stivers and the eighty (80) Harshman and Overlook pupils would attend Wilbur Wright.

It is our understanding that these pupils will attend high school in Dayton only next year, and that they will return to your new Mad River High School in September, 1957.

Very truly yours,

B. H. Armstrong
Director of Pupil Personnel

BHA:tr

cc: Mr. Holmes, Wilbur Wright High School
Mr. Carpenter, Stivers High School
Mr. Royer

Plaintiffs' Unmarked Exhibit

March 5, 1956

RE: William Aldrich

Mr. F. F. Carpenter
Principal, Stivers High School
Dayton, Ohio

Dear Mr. Carpenter:

The above-named pupil is a tuition case and prior to entering Stivers he attended Belmont Elementary School as a tuition pupil since the beginning of the 5th grade. He will continue next fall as a tuition pupil in the Dayton schools and may, therefore, attend the new Belmont High School.

Very truly yours,

B. H. Armstrong
Director of Pupil Personnel

BHA:tr

Plaintiffs' Unmarked Exhibit

August 29, 1962

Mr. Lloyd G. Phillips
Principal Dunbar High School
Dayton, Ohio

Dear Mr. Phillips:

Pupils living in the country or rural area in the southern part of Highview district are provided transportation to elementary and high school. Last year there were only approximately six high school students living in this area to be transported to Roosevelt and in order to avoid the use of one high school bus for only six pupils, Roosevelt High School rearranged the schedules of these six pupils giving them a Study Hall the first period. This made it possible for the one elementary bus running in this Highview area to pick up both elementary and high school pupils; drop the elementary pupils off at Highview and take the high school pupils on to Roosevelt arriving at Roosevelt sometime during the first period. There was no problem in the afternoon of course since the high school is out earlier than elementary. The one bus would first pick up the high school students at Roosevelt at 3:00 o'clock and go by Highview and pick up the elementary.

Now that the Highview district is in Dunbar, we would like to continue this same plan providing there are not too many high school pupils and of course assuming that their schedules can be arranged as last year. I do not have the names of the high school pupils in this area who will be entering Dunbar this fall. Possibly Mrs. Sharp may know or soon after school opens we will learn who they are.

Very truly yours,

B. H. Armstrong
Director of Pupil Personnel

BHA:ev
cc – Mrs. Sharp, Highview Elementary School

PLAINTIFFS' EXHIBIT 16D

1972-73 TRANSFERS BETWEEN SCHOOLS

1] Freedom of Enrollment

Approvals
Whites
23 Approved
22 to white schools
1 from parochial school to school 54.6% black

Blacks
460 Approved
1 to black school
459 to white schools

2] Disciplinary Transfers

Blacks	
Black to black	6
Black to white	2
Whites	
White to white	3
Mixed to white	

Source: D.P.S. Unit Directors and Student Relations Department

PLAINTIFFS' EXHIBIT 16F

1972-73 OTHER TRANSFERS BETWEEN SCHOOLS

3] Hardship and Emergency Transfers

260 Blacks

Black to black	157
White to black	3
Black to white	73
White to white	12
Mixed to white	5
Mixed to black	8
Black to mixed	2

104 Whites

White to white	71
Black to white	6
Mixed to white	17
Mixed to black	0
White to mixed	8
White to black	2

4] Special Education Transfers

117 Blacks

Black to black	91
White to black	7
Black to white	4
White to white	15
Mixed to white	–
Mixed to black	–
Black to mixed	–

Plaintiffs' Exhibit 16F

67 Whites	
White to white	61
Black to white	—
Mixed to white	—
Mixed to black	5
White to mixed	1
White to black	—

Source: D.P.S. Unit Directors

PLAINTIFFS' EXHIBIT 21

Policy Regarding Integration

The Board of Education is opposed to racial segregation in the Dayton Public Schools. It is the policy of the Board of Education to continue and enlarge gradually the program of integration of the educational staff with the objective of having on the educational staff approximately the same proportion of negro teachers as there are negro pupils in the Dayton schools.

The school administration will make every effort to introduce some white teachers in schools in negro areas that are now staffed by negroes, but it will not attempt to force white teachers, against their will, into these positions.

The administration will continue to introduce negro teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro teachers.

The Board of Education does not consider a school to be segregated when the school district, which the school serves, contains children of only one race. Because attendance at Dunbar High School, in the 9, 10, 11, and 12 grades, is voluntary, the Board of Education does not consider Dunbar High School to be a segregated school.

ROBERT B. FRENCH,
Superintendent of Schools

PLAINTIFFS' EXHIBIT 28

SOME FACTS AND FIGURES REGARDING INTEGRATION FOR BOARD OF EDUCATION DISCUSSION AT LUNCHEON MEETING

December 2, 1954

All elementary schools have definite boundaries and children are obliged to attend the school which serves the area in which they reside. The policy of transfers from one school to another was abolished two years ago when the boundaries of several westside elementary schools were shrunken, permitting a larger number of Negro children to attend mixed schools. The policy of no transfers was not retroactive. (i. e. If a child had permission to attend a mixed school before the ruling became effective, he can continue to attend this school for his elementary education.)

Dunbar High School has no boundary lines. Theoretically, any child in the city can elect Dunbar, but, practically, only Negro children attend. The staff is completely negro, except for Driver Training teachers. Children who attend the high school grades at Dunbar do so by choice. A Negro child can always attend the high school which serves his area.

The schools keep no records of racial identification, but the school census taken last May, 1954, enumerated 8,295 negro children between the ages of 5 and 17, which is 15.7% of the total number of children enumerated between the ages of 5 and 17. The school enrollment of negro children would be less than 15.7%, due to the fact that a larger percentage of negro families than white families do not send their children to kindergarten and there is always a larger drop-out rate among older negro children.

At the present time we employ 168 negro teachers out of a total 1,577 teaching positions, which is 10.6%. In September, 1951, the first negro teacher was placed in a mixed school —

Weaver School. At the present time we have 17 negro teachers assigned to mixed or all-white schools. In addition, we have at the present time 8 white teachers working in all-negro schools — 3 on a full-time basis and 5 on a part-time basis. The following elementary schools having mixed or all white population have negro teachrs:

Edison (4)	Emerson (1)	Weaver (3)
Jackson (3)	McKinley (1)	Whittier (1)
Highview (1)	Washington (1)	Van Cleve (1)
	Webster (1)	

About two years ago we announced a policy of attempting to introduce white teachers in our schools having negro population. We have not been too successful in this regard and at the present time have only 8 full or part-time teachers in these situations. There is a reluctance on the part of white teachers to accept assignments in westside schools and up to the present time we have not attempted to use any pressure to force teachers to accept such assignments. The problem of introducting white teachers in negro schools is more difficult than the problem of introducing negro teachers into white situations. There are several all-white schools which in the near future will be ready to receive a negro teacher.

The policy of sending negro children from Shawen Acres to Garfield School was discontinued this September and these children now attend Van Cleve, Brown, Loos and Shiloh schools.

ROBERT B. FRENCH,
Superintendent of Schools

PLAINTIFFS' EXHIBIT 29

October 10, 1956

REPORT ON PROGRESS TOWARD STAFF INTEGRATION DAYTON PUBLIC SCHOOLS

The first Negro teacher pleaced in school and classroom with both Negro and white pupils was in September 1951. The teacher was Mrs. Willeta Weatherford, then Miss Willeta Chavous.

In September 1952 we had 7 teachers so placed, in 1953 there were 11. By 1954 we had 18 persons so employed, by 1955 there were 32, and this year there are 53 Negro teachers teaching in schools which are attended by pupils of both races or by all white pupils.

The schools and number of Negro teachers are as follows:

Brown	½
Central	1
Edison	4
Emerson	1
Greene	1
Grant	1
Highview	5
Irving	4
Jackson	7½
Van Cleve	1
Washington	2
Weaver	13
Whittier	5
Orville Wright	1
McKinley	1
Stivers	1
Roosevelt	2
Fairview	1
Wilbur Wright	1
Total	53

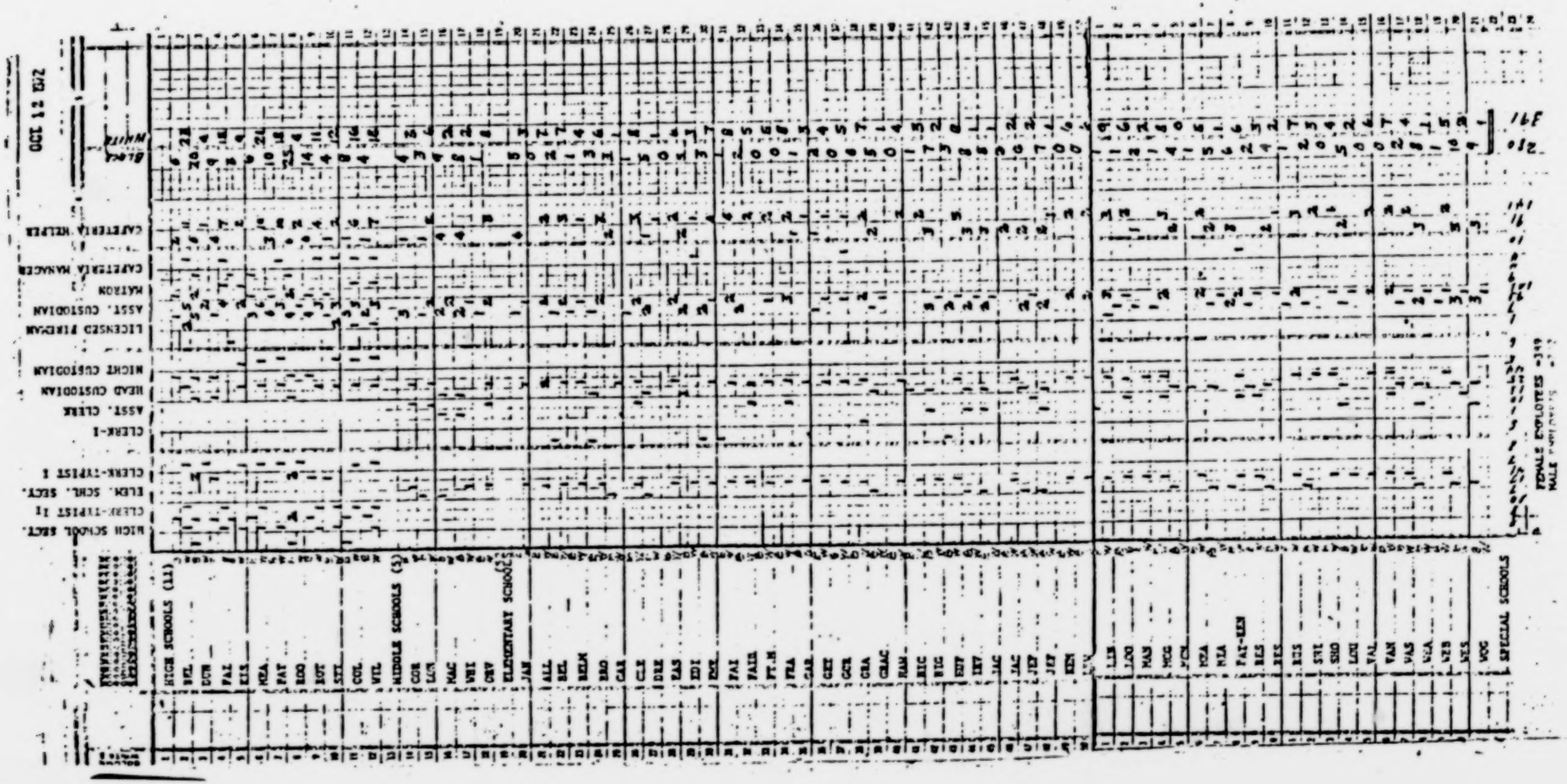
In addition 12 white teachers teach all or part time in schools attended only by Negro pupils as follows:

Dunbar	3	part time
Garfield	2	part time
Miami Chapel	3	full time
	4	part time
Wogaman	1	part time

32 new Negro teachers were employed this year.

In all 838 teachers are working in a school staff at present which has some degree of racial integration.

PLAINTIFFS' EXHIBIT 42



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PLAINTIFFS' EXHIBIT 55

[LETTERHEAD OF STATE OF OHIO, DEPARTMENT OF EDUCATION, COLUMBUS, 43215]

March 20, 1972

Dr. Wayne M. Carle
Superintendent
Dayton City Schools
348 W. 1st Street
Dayton, Ohio 45402

Dear Dr. Carle:

We have received several calls which would appear to be products out of the rumor mill dealing with possible curtailment of specific staff in the Dayton City Schools. Rumor has it that the Dayton Board of Education is preparing a cutback of personnel working with School-Community Services.

As you know, this office has worked very closely with your staff in school-community relations over the past few years. We have tried to be helpful in securing additional funds to aid in such areas as staff development, community understanding and other matters pertaining to better human relations. The explosive nature of community emotions in Dayton requires the continuing efforts of your excellent school-community services staff.

The Department has had excellent support from the legislature in expanding funds to local districts under Disadvantaged Pupil Programs and Municipal Overburden. Priorities emphasized in our legislative hearings including funding to assist schools and their communities in human relations efforts. All of us realize that good education is best achieved in a climate of understanding. This has been the thrust of your school-community services department.

Plaintiffs' Exhibit 55

The privilege of local autonomy is recognized from our level, and I would be the last to attempt to interfere in local school goverance. However, there have been so many reversals of a negative nature coming out of your district recently until I am forced to take a good hard look at the priority posture toward the elimination of vital services.

I am requesting that you keep me informed as to any change in posture which might eliminate services under our special funding sources. Dayton, as all our districts, has on file a 441 agreement under Title VI of the Civil Rights Act. This agreement permits the application for and flow of federal and special state dollars to guarantee equal educational opportunity. I would not like to be forced into a position calling for a recommendation of withdrawal or withholding of funds.

Sincerely,

/s/ ROBERT O. GREER
Assistant Superintendent
Urban Education

ROG:mh

PLAINTIFFS' EXHIBIT 56

[LETTERHEAD OF TOUCHE ROSS & CO.]

July 11, 1972

Mr. James D. Hart, President
Dayton Board of Education
Dayton, Ohio

Dear Mr. Hart:

We have completed our independent review of the overall Business Operations of the Dayton School District. As a result of our detail analysis work, we have developed recommendations which are presented in the enclosed report. These recommendations provide a basis for direct action by the School District on major business management matters.

We would like to express our thanks to members of the Board, the Superintendent and the Administrative staff for their excellent cooperation throughout the project. Their cooperation enabled us to develop the recommendations in the enclosed report.

We have not attempted herein to summarize the accomplishments of the school system or the dedication of the personnel that was noted in our review. To do so would increase the size of this document beyond manageable proportions. Rather, we have concentrated only on those areas in which we believe action should be taken.

It is sincerely hoped that this study, together with other programs and activities by the Board and the Administration, will enable the School District to make additional progress toward its main objectives.

Respectfully submitted,

/s/ TOUCHE ROSS & CO.

DAYTON BOARD OF EDUCATION
BUSINESS OPERATIONS REVIEW REPORT

INTRODUCTION

Project Objective

On February 24, 1972, the Dayton Board of Education voted unanimously to engage Touche Ross & Co. to conduct an independent review of the overall business operations of the Dayton Public Schools directed toward achieving increased economies where possible and analyzing the allocation of resources. We were to make recommendations based upon the results of the review. The study thus involved a review of the organizational, operational, financial and managerial practices presently employed in the system. It did not include an evaluation of educational programs nor an evaluation of individual employees.

Project Approach

The study began in mid-March. During the initial phase of the project, we conducted interviews with personnel throughout the school organization, from Board members and the Superintendent to Department Supervisors and operational personnel. The purpose of these interviews was to give us an understanding of both the present and planned future organization structure and operational practices. We visited a selected sample of schools to assure proper understanding of school operations. Also we devoted a significant amount of time to collecting and analyzing data on staffing, work procedures, activity levels and productivity (where applicable) in each of the areas reviewed.

We used basically four criteria which we have found relevant in similar situations to assist us in the evaluative process:

1. Standards or guidelines established by the State Department of Education.

2. Standards or guidelines established within the Dayton School District.
3. Comparable operating statistics of other school systems.
4. Sound business practices substantiated by Touche Ross & Co. experience within similar operations in government and business.

The observations and recommendations we have developed have been reviewed and discussed in detail with the person or persons responsible and general implementation strategies have been discussd. In areas where it was not planned for us to make our all encompassing review, we have noted situations which warranted further analysis by the School District.

The analysis inherent in our study was not and should not be considered an audit of the operations of the School District. The conclusions should not be considered as an expression of an audit opinion under generally accepted auditing standards.

SUMMARY OF RECOMMENDATIONS

In this section of the report we have summarized our recommendations which represent approximately two millior dollars in potential annual savings plus a one-time savings of two to three million dollars for the Dayton Board of Education. Dollar savings were estimated at 1972 expenditure level. In addition, several recommendations have been made which do not necessarily result in cost savings but should increase the effectiveness of the operations of the School District. Supporting information is provided in the Detail Section of this report.

A. School Facilities

— Appoint a Study Committee to select schools to be

phased out and plan the implementation of student reassignment. The committee's minimum objective should be to increase the overall elementary and middle school classroom utilization to 85% by phasing out nine *average size* schools or the equivalent thereof.

Estimated Annual Dollar Savings – $745,000 to $895,000

Estimated One-Time Dollar Savings – $2,000,000 to $3,000,000

B. Teacher Staffing

– Adopt the practice of using projected average daily membership (ADM) as the basis for teacher staffing rather than projected enrollment.

Estimated Annual Dollar Savings – $350,000

• • •

– Review staffing levels in schools that have low efficiency in meals per hour of serving labor with the objective of raising the productivity to the median value presently achieved by comparable school lunch programs in other Dayton Schools.

Estimated Dollar Savings – $20,400

– Improve the inventory control, cost reporting and management information for the food service operation as described in the detail report.

G. Purchasing

– Modify the present computer system for inventory reporting to use more sophisticated inventory con-

trol techniques and to provide exception reporting. High cost items should be implemented first on the new system.

– Revise the warehouse storage space assignments to assure efficient stock picking procedures.
Estimated Annual Dollar Savings – $10,000

H. Additional Observations

– Review student transportation policy as compared to state requirements and either revise policy or eliminate outside contract through purchase and operation of Board owned buses, saving money in either case. The effect of the freedom of enrollment policy was not included in this analysis because it is too early to predict the effect at this time.

Estimated Annual Dollar Savings – $50,000

– Renegotiate the current maintenance contract (with regard to specialization by craft and wage rate as a percent of effective average rate of construction craftsmen in the Dayton, Ohio area) or seriously consider the feasibility of a maintenance contract with an outside firm.

– Continue as a member of the Metropolitan Dayton Educational Cooperative Association (MDECA).

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A. SCHOOL FACILITIES

BACKGROUND

Over the past several years there has been much discussion regarding the feasibility of closing several elementary schools. Primarily the context of the discussions has been in regard to the adequacy of the facilities and the wisdom of committing

capital expenditures to improve the facilities. Various studies regarding school facilities have been made, such as: Educational Facilities Evaluation prepared by the Educational Administration and Facilities Unit of the College of Education of Ohio State University; Report of the Committee of 75 (Buildings and Facilities – Subcommittee IX); the analyses of Continued Operation of Selected Elementary School Facilities by Mr. Robert Weinman, Executive Director of Management Services Department, Dayton City Schools and others.

Current Situation

We have attempted in our study to identify, quantify and more clearly state what we believe to be one of the major problems which faces management of the Dayton School District. The basic problem is not simply inadequate facilities but, in addition, is under-utilization of existing facilities. When the two problems are considered jointly there is an opportunity to solve, to a significant degree, both problems with a mutual solution which is eliminating excess capacity by phasing out those facilities which are inadequate and would require major capital expenditures to renovate.

This percentage is actually overstated since schools are essentially closed for three months or an additional one-fourth of a year. In light of the fact that the enrollment projections call for a reduction of approximately 5,495 students in elementary and middle schools by the school year 1975-76, the utilization rate will drop to seventy percent (70%), if existing facilities are not phased out. Under-utilization of facilities is definitely important because the School District has an investment in the buildings which could be at least partially recovered through other uses of the buildings and property. Also, the District is incurring annual operating costs which could be spent in other areas of need, if the buildings which are not required were phased out.

The annual operating cost on a system-wide basis for elementary and middle schools that could be saved is approxi-

mately $140.00 per unit of student capacity (see Exhibit A-2). The *average size* elementary and middle school on a system-wide basis has a student capacity of 746 students. Thus, if one *average size* elementary school were closed to eliminate excess classroom capacity, the School District would realize an annual savings of approximately *$105,000.* By 1975-76 school year, the excess capacity will be 12,872 student units. Thus, in order to achieve 85% utilization by the 1975-76 school year, nine (9) *average size* schools of 746 student capacity or the equivalent thereof must be phased out.

Recommendations

We recommend that a committee be formed to conduct a study to determine specifically the number of schools to be phased out of operation, the selection of specific schools to be closed, the phase out timetable, the student transfer implementation plan, the redefined school boundaries and the recommended alternative use or disposition of the facility. This recommended approach of assigning a study group will assure that this issue receives an appropriate amount of attention and will assure that the potential annual and one-time savings are eventually realized. We recommend further that the study group use 85% utilization of capacity as its overall minimum objective in dealing with this problem. The study group should also consider the issue of a twelve month school year and develop a position paper stating its conclusions. To assist the study committee we have enclosed a listing (Exhibit A-3) of the top twenty elementary and middle schools ranked on the basis of required capital expenditures through 1980.

Benefits

Assuming the study committee achieves the minimum objective of 85% utilization of classroom space on a system-wide basis, nine *average size* schools or their equivalent will be

phased out, permitting the Dayton School District to realize a cost reduction of approximately $945,000 ($105,000 X 9) each year after the selected schools are closed. As a result of redefining school boundaries, some students will probably have to be transported to their new schools. We estimate the increased cost to approximate $50,000 to $200,000 depending upon the schools selected.

In addition to the annual savings defined above, the capital expenditures required to renovate the closed buildings will not have to be expended; thus saving the Dayton School District an estimated $2,000,000 to $3,000,000, depending upon the selection of schools to be closed.

ADDITIONAL COMMENTS

We analyzed the high schools' capacity, utilization and capital expenditure requirements statistics. We noted that, overall, they are utilizing eighty percent (80%) of their classroom capacity. The projected enrollments call for an increase of approximately 700 students by the 1975-76 school year which will increase the utilization rate to eighty-four percent (84%), which is close to the 85% minimum objective for elementary and middle schools. However, several additional facts should be considered by the study committee:

1. The declining enrollment in the elementary and middle schools will have an impact on the high schools after the 1975-76 school year.
2. Roosevelt High School has a projected capital expenditure requirement of $3,581,000 between 1972 and 1980 and has a student capacity of 1,904 students.
3. Kiser High School has a projected capital expenditure requirement of $583,000 between 1972 and 1980 (second only to Roosevelt among the high schools) and has a student capacity of only 714 which is far below the normal capacity for a high school.

It is readily apparent, based upon all of the foregoing data which we have presented, that phasing out schools and redistricting school boundaries is a *necessity* for sound financial management of the Dayton School District and one which requires immediate attention. However, the task assigned to the study committee is a very complex problem which will require detail analysis and careful planning for implementation. The phasing out of selected schools should take place over a time period that allows for proper transition and implementation, consistent with timely achievement of benefits. As a possible target date, it would appear that implementation could begin by September, 1973, if the committee becomes operational in the near future.

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II. ADDITIONAL OBSERVATIONS

TRANSPORTATION

The present policy of the Dayton Board of Education for transportation of students exceeds the requirements of the state law as revised in House Bill 475. All data presented excludes the cost effect of the freedom of enrollment policy since it cannot be accurately determined at the present time. The cost of providing the additional service in excess of the state requirement is approximately $250,000 per year. The cost benefit of this service should be analyzed to assure that it is a worthwhile expenditure of funds. If the Dayton Board of Education were to eliminate only the transportation of high school students, the cost of transportation would be reduced approximately $125,000.

Should the Dayton Board of Education decide to continue operating with the present policy, approximately $50,000 could be saved by replacing the services purchased from St. John's Transportation Company through the purchase and operation of Board owned buses.

Plaintiffs' Exhibit 56

MAINTENANCE

The primary problem facing the Dayton Board of Education in the maintenance area is the contract they have with the Dayton Building and Construction Trades Council, on behalf of its affiliated local unions. The contract requires craft specialization (skilled craftsman – plumbers, electricians, painters, etc.) within a maintenance function where job flexibility is necessary for efficient operation of a staff the size of Dayton's. Larger school districts can operate efficiently with specialized workers due to the number of personnel involved. Also, the contract sets hourly wages at 84% of each craftsman's journeyman's hourly wage rate in effect in the Dayton, Ohio area. Considering the fringe benefits the Dayton School System provides and the guarantee of working a full year (which is not true for construction craftsmen), the cost of maintenance work is the same for the Dayton School System whether they have their maintenance men perform the work or they contract for outside services, assuming equal productivity per hour. Unless better contract terms can be negotiated, we recommend that the Dayton Board of Education request proposals and seriously consider the possibility of entering into a maintenance contract with an outside firm. Since most problems with maintenance contracts are concerned with the level of service on emergency calls, the proposals should stipulate a guaranteed timing on emergency calls and/or not include an emergency provision, which would be covered by a small maintenance staff of the Dayton Board of Education.

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PLAINTIFFS' EXHIBIT 75

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Enrollment Estimates of Two Plans for
Redistricting of Westside Schools.

The choice of either of the following plans on their modification should be based upon several factors.

1. The resistance of some parents to sending their children to school in their district because it is an all negro school.

2. Additions to Willard and Garfield schools will involve purchase of improved property.

3. By decreasing the size of the existing districts and making additions to other schools it will give greater opportunity for some parents to move into a district that has a mixed school.

Plan A.

Leave the districts as they are except for that area between Willard and Wogaman schools that will be assigned to the new Elementary school on Danner Ave.,

Plan B.

Decrease the Wogaman district and add to Jackson and Weaver.

Decrease the Garfield district and add to Edison and Irving.

Since the Willard district is not involved in Plan B. the problem of additional space is dependent only upon the size at the new Westside school.

Plaintiffs' Exhibit 75

Present Planned Classrooms

	Willard	Westside
Kindergarten	2	2
Practical Arts	1	1
Regular classrooms	19	17
Sub-standard classrooms	4	
Multi-purpose room		1

Estimated Needs for 1958

	Willard	Westside
Kindergarten	2	2
Practical Arts	1	1
Regular classrooms	29	31
Multi-purpose rooms	1	

Conclusions – 14 room addition to the new Westside
10 room addition to the Willard school

	1952 Regular Classrooms	Required class-rooms for 1958 Plan A	Plan B	Required Class-rooms for 1960 Plan A	Plan B
Totals of Grade Level Rooms					
Garfield	13[a]	24	17	27	20
Edison	16	18	22	18	22
Irving	20	22	25	22	28
Wogaman	23	26	23	29	23
Jackson	25	25	29	28	31
Weaver	20	29	32	30	35
Estimated Enrollment divided by 35					
Garfield	13[a]	25	17	28	20
Edison	16	17	21	17	21
Irving	20	22	26	22	27
Wogaman	23	26	22	29	23
Jackson	25	26	29	28	31
Weaver	20	29	31	32	34

[a] Does not include 4 rooms in multi-purpose room

Plaintiffs' Exhibit 75

To summarize Plan A, the following additions would be required:

Garfield

1. 15 room addition at Garfield.
2. Purchase improved property in an area where the lots are irregular as to depth.
3. Remove partitions from present multi-purpose room.

Edison – 2 room addition
Irving – 2 room addition
Wogaman – 6 room addition
Jackson – 3 room addition
Weaver – 12 room addition

To summarize Plan B, the following additions would be required.

Garfield – 1. 7 room addition
2. Purchase improved property
3. Remove partitions
Edison – 6 room addition
Irving – 8 room addition
Wogaman – nothing
Jackson – 6 room addition
Weaver – 15 room addition

PLAINTIFFS' EXHIBIT 100A

Dayton Public Schools
NEGRO ENROLLMENTS AND FACULTY
1947-48

Negro Schools	Total Enrollment	Negro Enrollment*	Percentage Negro	Percentage Negro Faculty***
Dunbar	1205	1205	100.0	100.0
Garfield	567	567	100.0	100.0
Willard	705	785	100.0	100.0
Wogaman	958	958	100.0	100.0
Total	3515*	3515*		
Mixed Schools				
Kiser	913	10	1.1	0.0
Parker	661	0	0.0	0.0
Roosevelt	2049	314	15.3	0.0
Stivers	1153	1	0.1	0.0
Wilbur Wright	1150	16	1.4	0.0
Addams	380	96	25.3	0.0
Allen	409	36	8.8	0.0
Central	600	241	40.2	0.0
Drexel	565	119	21.1	0.0
Edison	439	133	30.3	0.0
Emerson	1030	12	1.2	0.0
Greene	341	20	5.9	0.0
Huffman	769	3	0.4	0.0
Irving	850	218	25.6	0.0
Jackson	606	114	16.6	0.0
Longfellow	464	3	0.6	0.0
Ruskin	586	2	0.3	0.0
Washington	612	120	19.6	0.0
Weaver	678	403	59.4	0.0
Westwood	812	1	0.1	0.0
Whittier	525	94	17.9	0.0
Highview				
Gorman	111	8	7.2	0.0
Kennedy	65	0	0.0	0.0
Total	15848*	1964*		
White Schools				
Fairview High	837	0	0.0	0.0
Colonel White	814	0	0.0	0.0
Belmont	938	0	0.0	0.0
Brown	720	0	0.0	0.0
Cleveland	673	0	0.0	0.0
Fairview El.	658	0	0.0	0.0
Ft. McKinley	580	0	0.0	0.0
Franklin	446	0	0.0	0.0
Grant	275	0	0.0	0.0
Hawthorne	263	0	0.0	0.0
Jefferson	682	0	0.0	0.0
Kemp	228	0	0.0	0.0
Lawton	141	0	0.0	0.0
Lincoln	643	0	0.0	0.0
Loos	347	0	0.0	0.0
McGuffey	406	0	0.0	0.0
Patterson	499	0	0.0	0.0
Residence Park	133	0	0.0	0.0
Shiloh	314	0	0.0	0.0
Van Cleve	498	0	0.0	0.0
Webster	760	0	0.0	0.0
Total	10170**	5679*		
GRAND TOTAL	30569*			
GRAND TOTAL	30618**			

*Research Department, 1952
**Annual enrollment report, Child Accounting
***School directories for the respective years

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PLAINTIFFS' EXHIBIT 100B

Dayton Public Schools
NEGRO ENROLLMENTS AND FACULTY
1918-49

Negro Schools	Total Enrollment	Negro Enrollment*	Percentage Negro	Percentage Negro Faculty***
Dunbar	1234	1234	100.0	100.0
Garfield	595	595	100.0	100.0
Willard	907	907	100.0	100.0
Wogaman	877	877	100.0	100.0
Total	3613*	3613*		
Mixed Schools				
Kiser	901	6	0.7	0.0
Parker	671	4	0.6	0.0
Roosevelt	2115	365	17.3	0.0
Stivers	1130	5	0.4	0.0
Wilbur Wright	1162	15	1.3	0.0
Addams	405	118	29.1	0.0
Allen	423	39	9.2	0.0
Central	595	232	39.0	0.0
Drexel	633	156	24.6	0.0
Edison	437	120	27.5	0.0
Emerson	1054	15	1.4	0.0
Greene	351	17	4.8	0.0
Huffman	750	0	0.0	0.0
Irving	848	247	29.1	0.0
Jackson	712	170	23.9	0.0
Longfellow	476	3	0.6	0.0
Ruskin	616	2	0.3	0.0
Washington	610	121	19.8	0.0
Weaver	698	439	62.9	0.0
Westwood	806	0	0.0	0.0
Whittier	518	104	20.0	0.0
Highview				
Gorman	109	12	11.0	0.0
Kennedy	71	0	0.0	0.0
Total	16091*	2190*		
White Schools				
Fairview High	814	0	0.0	0.0
Colonel White	977	0	0.0	0.0
Belmont	977	0	0.0	0.0
Brown	747	0	0.0	0.0
Cleveland	700	0	0.0	0.0
Fairview El.	599	0	0.0	0.0
Ft. McKinley	674	0	0.0	0.0
Franklin	460	0	0.0	0.0
Grant	301	0	0.0	0.0
Hawthorne	258	0	0.0	0.0
Jefferson	756	0	0.0	0.0
Kemp	241	0	0.0	0.0
Lawton	171	0	0.0	0.0
Lincoln	647	0	0.0	0.0
Loos	439	0	0.0	0.0
McGuffey	481	0	0.0	0.0
Patterson	506	0	0.0	0.0
Residence Park	274	0	0.0	0.0
Shiloh	312	0	0.0	0.0
Van Cleve	473	0	0.0	0.0
Webster	718	0	0.0	0.0
Total	11101**			
		5603*		
GRAND TOTAL	31509*			
GRAND TOTAL	31533**			

*Research Department, 1952
**Annual enrollment report, Child Accounting
***School directories for the respective years

PLAINTIFFS' EXHIBIT 100C

Dayton Public Schools
NEGRO ENROLLMENTS AND FACULTY
1949-50

Negro Schools	Total Enrollment	Negro Enrollment*	Percentage Negro	Percentage Negro Faculty***
Dunbar	1208	1208	100.0	100.0
Garfield	611	611	100.0	100.0
Willard	866	866	100.0	100.0
Wogaman	1021	1021	100.0	100.0
Total	3706*	3706*		
Mixed Schools				
Kiser	903	8	0.9	0.0
Parker	595	5	0.8	0.0
Roosevelt	2224	431	19.4	0.0
Stivers	1169	7	0.6	0.0
Wilbur Wright	1193	15	1.3	0.0
Addams	341	94	27.6	0.0
Allen	477	34	7.1	0.0
Central	628	227	36.1	0.0
Drexel	740	175	23.6	0.0
Edison	418	139	33.3	0.0
Emerson	1082	16	1.5	0.0
Greene	334	22	6.6	0.0
Huffman	771	3	0.4	0.0
Irving	890	229	25.7	0.0
Jackson	746	154	20.6	0.0
Longfellow	450	2	0.4	0.0
Ruskin	601	1	0.2	0.0
Washington	634	115	18.1	0.0
Weaver	735	473	64.4	0.0
Westwood	833	1	0.1	0.0
Whittier	518	123	22.0	0.0
Highview				
Gorman	104	20	19.2	0.0
Kennedy	81	1	1.2	0.0
Total	16497*	2195*		
White Schools				
Fairview High	773	0	0.0	0.0
Colonel White	921	0	0.0	0.0
Belmont	1084	0	0.0	0.0
Brown	705	0	0.0	0.0
Cleveland	707	0	0.0	0.0
Fairview El.	773	0	0.0	0.0
Ft. McKinley	459	0	0.0	0.0
Franklin	487	0	0.0	0.0
Grant	324	0	0.0	0.0
Hawthorne	267	0	0.0	0.0
Jefferson	876	0	0.0	0.0
Kemp	244	0	0.0	0.0
Lawton	169	0	0.0	0.0
Lincoln	669	0	0.0	0.0
Loos	531	0	0.0	0.0
McGuffey	492	0	0.0	0.0
Patterson	476	0	0.0	0.0
Residence Park	346	0	0.0	0.0
Shiloh	267	0	0.0	0.0
Van Cleve	445	0	0.0	0.0
Webster	717	0	0.0	0.0
Total	11735**			
		5901*		
GRAND TOTAL	32552*			
GRAND TOTAL	32566**			

*Research Department, 1952
**Annual enrollment report, Child Accounting
***School directories for the respective years

PLAINTIFFS' EXHIBIT 100D

Dayton Public Schools
NEGRO ENROLLMENTS AND FACULTY
1950-51

Negro Schools	Total Enrollment	Negro Enrollment*	Percentage Negro	Percentage Negro Faculty***
Dunbar	1132	1132	100.0	100.0
Garfield	685	685	100.0	100.0
Willard	818	818	100.0	100.0
Wagaman	1107	1107	100.0	100.0
Total	3742*	3742*		
Mixed Schools				
Kiser	910	7	0.8	0.0
Parker	634	5	0.8	0.0
Roosevelt	2306	642	27.8	0.0
Stivers	1129	9	0.8	0.0
Wilbur Wright	1289	22	1.7	0.0
Addams	405	123	30.4	0.0
Allen	475	46	9.7	0.0
Central	638	245	38.4	0.0
Drexel	742	189	25.5	0.0
Edison	432	186	43.1	0.0
Emerson	1158	24	2.1	0.0
Greene	359	28	7.8	0.0
Huffman	795	0	0.0	0.0
Irving	960	262	27.3	0.0
Jackson	785	206	26.2	0.0
Longfellow	494	4	0.8	0.0
Ruskin	600	2	0.3	0.0
Washington	653	124	19.0	0.0
Weaver	648	453	19.9	0.0
Westwood	860	1	0.1	0.0
Whittier	515	142	22.5	0.0
Highview				
German	110	20	18.2	0.0
Kennedy	89	3	3.4	0.0
Total	16975*	2743*		
White Schools				
Fairview High	813	0	0.0	
Colonel White	909	0	0.0	
Belmont	1009	0	0.0	
Brown	729	0	0.0	
Cleveland	701	0	0.0	
Fairview El.	834	0	0.0	
Ft. McKinley	489	0	0.0	
Franklin	516	0	0.0	
Grant	365	0	0.0	
Hawthorne	273	0	0.0	
Jefferson	953	0	0.0	
Kemp	271	0	0.0	
Lewton	191	0	0.0	
Lincoln	876	0	0.0	
Loos	596	0	0.0	
McGuffey	486	0	0.0	
Patterson	478	0	0.0	
Residence Park	412	0	0.0	
Shiloh	286	0	0.0	
Van Cleve	506	0	0.0	
Webster	706	0	0.0	
Total	12291**	6285*		
GRAND TOTAL	33622*			
GRAND TOTAL	33663**			

*Research Department, 1952
**Annual enrollment report, Child Accounting
***School directories for the respective years

PLAINTIFFS' EXHIBIT 100E

Dayton Public Schools
NEGRO ENROLLMENTS AND FACULTY
1951-52

Negro Schools	Total Enrollment	Negro Enrollment*	Percentage Negro	Percentage Negro Faculty***
Dunbar	1018	1018	100.0	100.0
Garfield	700	700	100.0	100.0
Willard	773	773	100.0	100.0
Wagaman	1111	1111	100.0	100.0
Total	3602*	3602*		
Mixed Schools				
Kiser	923	5	0.5	0.0
Parker	708	8	1.1	0.0
Roosevelt	2407	759	31.5	0.0
Stivers	1127	13	1.2	0.0
Wilbur Wright	1340	29	2.2	0.0
Addams	443	130	29.3	0.0
Allen	494	40	8.1	0.0
Central	687	233	33.9	0.0
Drexel	737	213	28.9	0.0
Edison	463	199	43.0	0.0
Emerson	1218	22	1.8	0.0
Greene	401	26	6.5	0.0
Huffman	774	1	0.1	0.0
Irving	669	312	46.6	0.0
Jackson	790	284	35.9	0.0
Longfellow	459	2	0.4	0.0
Ruskin	596	2	0.3	0.0
Washington	706	128	18.1	0.0
Weaver	639	432	67.6	4.0
Westwood	844	0	0.0	0.0
Whittier	538	161	29.9	0.0
Highview	409	7	1.7	0.0
German	101	17	16.8	0.0
Kennedy	92	3	3.3	0.0
Total	17605*	3026*		
White Schools				
Fairview High	856	0	0.0	0.0
Colonel White	987	0	0.0	0.0
Belmont	1147	0	0.0	0.0
Brown	824	0	0.0	0.0
Cleveland	711	0	0.0	0.0
Fairview El.	905	0	0.0	0.0
Ft. McKinley	364	0	0.0	0.0
Franklin	504	0	0.0	0.0
Grant	400	0	0.0	0.0
Hawthorne	278	0	0.0	0.0
Jefferson	946	0	0.0	0.0
Kemp	276	0	0.0	0.0
Lewton	196	0	0.0	0.0
Lincoln	640	0	0.0	0.0
Loos	594	0	0.0	0.0
McGuffey	524	0	0.0	0.0
Patterson	456	0	0.0	0.0
Residence Park	462	0	0.0	0.0
Shiloh	303	0	0.0	0.0
Van Cleve	483	0	0.0	0.0
Webster	618	0	0.0	0.0
Total	12500**	6628*		
GRAND TOTAL	34610*			
GRAND TOTAL	34647**			

*Research Department, 1952
**Annual enrollment report, Child Accounting
***School directories for the respective years

PLAINTIFFS' EXHIBIT 130B

Dayton Public Schools
NEGRO ENROLLMENTS AND FACULTY
1951-52

Negro Schools	Total Enrollment	Negro Enrollment*	Percentage Negro	Percentage Negro Faculty***
Dunbar	1018	1018	100.0	100.0
Garfield	700	700	100.0	100.0
Willard	773	773	100.0	100.0
Wogaman	1111	1111	100.0	100.0
Total	3602*	3602*		
Mixed Schools				
Kiser	923	5	0.5	0.0
Parker	708	8	1.1	0.0
Roosevelt	2407	759	31.5	0.0
Stivers	1127	13	1.2	0.0
Wilbur Wright	1340	29	2.2	0.0
Addams	443	130	29.3	0.0
Allen	494	40	8.1	0.0
Central	687	233	33.9	0.0
Drexel	737	213	28.9	0.0
Edison	463	199	43.0	0.0
Emerson	1218	22	1.8	0.0
Greene	401	26	6.5	0.0
Huffman	774	1	0.1	0.0
Irving	669	312	46.6	0.0
Jackson	790	284	35.9	0.0
Longfellow	499	2	0.4	0.0
Ruskin	596	2	0.3	0.0
Washington	706	128	18.1	0.0
Weaver	639	432	67.6	4.0
Westwood	844	0	0.0	0.0
Whittier	538	161	29.9	0.0
Highview	409	7	1.7	0.0
Gorman	101	17*	16.8	0.0
Kennedy	92	3	3.3	0.0
Total	17605*	3026*		
White Schools				
Fairview High	856	0	0.0	0.0
Colonel White	987	0	0.0	0.0
Belmont	1147	0	0.0	0.0
Brown	824	0	0.0	0.0
Cleveland	711	0	0.0	0.0
Fairview El.	905	0	0.0	0.0
Ft. McKinley	364	0	0.0	0.0
Franklin	504	0	0.0	0.0
Grant	400	0	0.0	0.0
Hawthorne	278	0	0.0	0.0
Jefferson	946	0	0.0	0.0
Kemp	276	0	0.0	0.0
Lewton	196	0	0.0	0.0
Lincoln	646	0	0.0	0.0
Loos	594	0	0.0	0.0
McGuffey	524	0	0.0	0.0
Patterson	456	0	0.0	0.0
Residence Park	462	0	0.0	0.0
Shiloh	303	0	0.0	0.0
Van Cleve	483	0	0.0	0.0
Webster	618	0	0.0	0.0
Total	12580**			
		6628*		
GRAND TOTAL	34610*			
GRAND TOTAL	34647**			

*Research Department, 1952
**Annual enrollment report, Child Accounting
***School directories for the respective years

PLAINTIFFS' EXHIBIT 130C

1963

Schools	Enrollment	# Black	% Black	# Teachers	# Black	% Black
Belmont H. S.	1768		0.0	70	1	1.4
Dunbar H. S.	1160		98.7	45	42	93.3
Fairview H. S.	1252		0.9	53	1	1.8
Kiser H. S.	740		2.7	38	2	5.3
Meadowdale H. S.	1154		0.0	44	2	4.5
Patterson Co-op	1070		1.8	49	1	2.0
Roosevelt H. S.	1850		94.5	62	22	35.8
Nettie Lee Roth H.S.	1120		53.5	46	11	23.9
Stivers H. S.	1150		2.6	55	4	7.2
Colonel White H.S.	1470		1.1	68	4	5.9
Wilbur Wright H.S.	1331		3.3	53	3	5.7
Cornell Heights	850		0.0	30.5	0	0.0
Longfellow	650		5.8	28	1	3.6
MacFarland	1229		99.6	43	43	100.
Whittier	925		95.6	32	14	43.8
Orville Wright	750		0.0	25	1	4.0
Jane Adams	600		41.8	30	3	10.0
Allen	574		0.4	18	0	0.0
Belle Haven	1160		0.0	37	0	0.0
Belmont Elem.	794		0.0	26	0	0.0
Brown Elem.	1177		0.5	39	0	0.0
Carlson Elem.	244		95.9	9	9	100.
Cleveland	1160		0.0	26	0	0.0
Drexel	700		3.5	23	0	0.0
Eastwood	750		0.0	28	1	3.6
Edison	800		80.0	26	6	23.1
Emerson	1000		0.0	40	2	5.2
Fairport	780		0.0	26	0	0.0
Fairview Elem.	667		1.0	20	0	0.0
Fort McKinley	510		0.0	17	0	0.0
Franklin	691		0.0	33	0	0.0
Gardendale	176		7.9	8	1	12.5
Gettysburg	630		0.0	19	1	5.2
Gorman	102		15.6	9	1	11.1
U. S. Grant	917		0.0	31	1	3.2
Grace A. Greene	715		89.5	23	11	47.8
Hawthorne	316		0.0	10	0	0.0
Hickorydale	585		0.0	18	0	0.0
Highview	807		82.0	30	16	53.3
Huffman	834		0.9	35	5	14.3
Irving	1035		96.4	34	17	50.0
Jackson Elem.	1147		98.3	31	23	74.2
Jackson Frie.	537		96.3	18	11	61.1
Jefferson Elem.	1204		1.2	38	0	0.0
Kemp	725		0.0	24	0	0.0
Lewton	600		0.0	20	0	0.0
Lincoln	1145		0.0	33	1	3.0
Loose	785		1.9	27	0	0.0
Horace Mann	435		0.0	15	0	0.0
McGuffey	925		0.0	34	1	2.9
Meadowdale Elem.	930		0.0	29	0	0.0
Miami-Chapel	793		99.6	39	37	93.1
Patterson-Kennedy	630		0.0	P.22 K.18	1 5	4.5 27.8
Residence Park	1112		80.0	35	2	5.7
Ruskin	1171		0.0	38	1	2.6
Shiloh	490		2.4	17	0	0.0
Shoup Mill	318		0.9	10	0	0.0
Louise-Troy	791		99.8	23	22	95.7
Van Cleve	770		0.9	25	2	8.0
Washington	650		23.0	21	2	9.5
Weaver	1260		98.3	40	31	77.5
Webster	531		0.1	18	1	5.5
Westwood	1900		94.7	64	20	31.2
Wogaman	1100		100.0	37	37	100.

PLAINTIFFS' EXHIBIT 130D

Schools	Enrollment	1968 # Black	1968 % Black	# Teachers	1968 # Black	1968 % Black
Belmont H. S.	2009		0.09	87	5	5.8
Dunbar H. S.	1497		99.3	70	62	88.6
Fairview H. S.	1420		5.2-	77	5	6.5
Kizer	762		1.8	46	2	4.4
Meadowdale H. S.	1657		1.1	79	4	5.1
Patterson Co-op	1582		18.3	85	3	3.5
Roosevelt H. S.	2003		100.	104	68	65.4
Nettie Lee Roth	1368		92.3	69	50	72.5
Stivers	910		0.6	53	3	5.7
Colonel White H. S.	1731		19.3	85	5	5.9
Wilbur WrightH.S.	1418		3.5	72	5	7.0
Cornell Heights	864		44.2	34	3	8.8
Longfellow	1049		43.3	40	7	17.5
MacFarlane	1283		99.9	49	48	98.0
Whittier	849		99.2	33	21	63.6
Orville Wright	792		0. 0	30	1	3.3
Jane Adams	683		73.9	26	6	23.1
Allen	604		0.1	25	1	4.0
Belle Haven	1108		5.0	45	2	4.4
Belmont Elem.	657		0.0	27	1	3.7
Brown	1145		0.6	45	1	2.2
Carlson	814		99.0	25	21	84
Cleveland	1348		0.0	45	1	2.2
Drexel	638		5.7	26	2	7.7
Eastmont	844		0.0	37	1	2.7
Edison	522		97.3	18	16	89.9
Emerson	904		6.8	43	4	9.3
Fairport	844		0.1	34	2	5.9
Fairview Elem.	739		1.7	34	2	5.9
Fort McKinley	466		0.0	18	1	5.6
Franklin	856		0.0	37	1	2.7
Gardendale	284		28.5	11	3	27.3
Gettysburg	451		5.2	26	1	3.9
Gorman	90		21.1	14	0	0.0
U. S. Grant	755		0.1	32	2	6.3
Grace A. Greene	563		96.8	26	21	80.8
Hawthorne	291		0.0	12	0	0.0
Hickorydale	529		6.6	27	0	0.0
Highview	925		97.0	36	21	58.3
Huffman	976		0.0	41	3	7.3
Irving	855		99.0	35	26	74.3
Jackson Elem.	862		99.1	39	33	84.6
Jackson Primary	686		98.8	33	19	82.6
Jefferson Elem.	945		60.1	44	8	18.2
Jefferson Primary	688		57.1	23	9	39.1
Kemp	683		0.0	28	0	0.0
Lewton	556		0.0	22	0	0.0
Lincoln	1070		0.0	43	1	2.3
Loose	704		4.6	29	1	3.5
Horace Mann	344		0.2	14	0	0.0
McGuffey	951		14.4	35	1	2.8
McNary Park	536		99.4	22	19	86.4
Meadowdale Elem.	671		0.0	31	1	3.2
Miami Chapel	688		99.9	33	29	87.9
Patterson/Kennedy	565		0.0	26	1	3.9
Residence Park Elem	754		98.8	31	23	67.7
Residence Park Jrsm	435		99.3	16	11	68.8
Ruskin	930		7.0	39	1	2.6
Shiloh	582		0.1	19	0	0.0
Shoup Hill	364		7.1	15	1	6.7
Louise Troy	676		100.0	20	20	100
Valerie	463		7.5	19	1	5.3
Van Cleve	801		1.1	34	1	2.9
Washington	709		19.4	27	4	14.8
Weaver	1235		99.9	48	43	89.7
Webster	574		0.0	28	0	0.0
Westwood	1573		99.4	64	42	65.6
Wegahan	1078		100	41	40	97.5

								1950	

Plaintiffs' Exhibit 143B

TOTAL	Parkside Homes	DeSoto Boss Courts	Summit Courts	Edgewood	DeSoto Boss	Arlington Courts	Westdale	Park Manor	Metro Gardens	Hillsp Homes	Chisca	Metro Gardens Annex	1507 S Manassas	1432 Rosemont 1432	40 E. Helena	Huffman	Pownell	641-647 Hickory Hill
	5-1	5-2	5-3	5-4	5-5	5-6	5-7A	5-7A	5-7C	5-9	5-8	5-11	5-12A	5-12B	5-12C	5-15A	5-15B	
12-31-1963																		
White	602	0	122	125	0	5												
Negro	0	310	17	10	200	308												
Other	0	0	0	0	0	0												
12-31 1968																		
White	525	0	50	102	0	5	0	206	52	1								
Negro	79	307	89	36	193	309	136	14	11	208								
Other	0	0	0	0	0	0	0	0	0	0								
6-30 1972																		
White	363	0	14	54	1	1	0	197	40	2	49	17	21	27	6	9	0	
Negro	226	310	124	83	198	311	136	23	23	208	30	7	1	1	8	3	2	
Other	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	

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Plaintiffs' Exhibit 143B

0-72	5-15C 3332 Germantown Jeff. Dennison	7-24 Grand Ave	5-15D 1164-118 Swinnerton	5-15E 724 Ruth	5-15F Riverview	5-15G Woodview	5-15H Hawthorne Fitch	5-15I 23-Bonner	5-15J 323 Xenia	5-15K 3918 Lori Sue	5-16 So. Central	5-17 938 Wilmington	5-18A 2531 Reverse	5-18C 926-928 Holt	5-18D Guilmont Hoch	5-18E Winters	5-18F Willow St.	5-19 McGee St.
White	0		1	0	18	31	0	1	2	0	74	67	6	0	12	1	6	18
Negro	5		1	1	1/2	26	6	0	0	6	36	23	2	8	0	5	0	6
Other	0		0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

0-72	5-20 Dunbar Manor	5-21A Mount Crest	5-21B Cornell	5-23 Embury Pk.	5-24 Helena	5-26 Grand Ave	5-30 Grand & Harshman
White	4	54	10	26	73	76	31
Negro	111	45	22	22	28	61	19
Other	0	0	0	1	0	0	0

SOURCE: HUD 1235 report forms on all figures except for those of 1960. Those figures were obtained by using 1961 1235 forms and records showing the demolition of projects.

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PLAINTIFFS' EXHIBIT 143J

August 31, 1951

Mr. William E. Bergeron, Director
Chicago Field Office
Public Housing Administration
201 N. Wells Street
Chicago, Illinois

Attention: Mr. Ed Klein

Dear Sir:

We enclose (2) school leases from Dayton Board of Education for use of the H-1 building on OHIO 5-2 and for the use of the small Community Building on OH-33155, De Soto Bass Courts, Dayton, Ohio.

The computation of charges at H-1 building are as follows:

R. M. & R.	$ 9.00
Heat	16.00
Water	3.00
Electricity	2.00
Janitorial	26.00
Janitorial Supplies	3.50
Rent	16.50
	$76.00

For the small Community Building at OH-33155 as follows:

R. M. & R.	$ 13.00
Heat	33.00
Water	4.00
Electricity	7.50
Janitorial	52.00
Janitorial Supplies	6.00
Rent	15.00
	$130.50

For non-heating months the charges are reduced the amount as shown.

Plaintiffs' Exhibit 143J

July 30, 1951

Mr. William E. Bergeron, Director
Chicago Field Office
Public Housing Administration
201 N. Wells Street
Chicago, Illinois

Attention: Mr. Ed Klein

Dear Sir:

We are in receipt of request from the Mad River Township Board of Education, the Van Buren Township Board of Education, and the Dayton City Board of Education for use of space in our various projects. The Mad River Board desires to use the Child Care Buildings at Overlook Homes Project OH-33093, and Harshman Homes, Project OH-33252. They have used these two buildings in the past, and while they have a new building under construction, they feel they will need these two buildings for another school year.

The Van Buren Township has a new 20 room elementary school building under construction on East Stroup Road, but it will also not be completed until the end of this coming school year. At that time they plan on using buses to transport the pupils from Moraine Fields, Project OH-33058.

The Dayton Board of Education is proceeding rapidly with their expansion plans, however, they have again requested the use of our N-1 Building at De Soto Bass Courts, Project 5-2 and 2A, and the small community building at OH-33155. They do not wish to use our space at McGuffey Homes, Project OH-33269, as the addition to the McGuffey School has been completed, and they are now able to take care of all the children.

We would appreciate your permission to negotiate with these school boards as we have in the past for leasing these spaces.

Plaintiffs' Exhibit 143J

Some time ago the Detroit office notified us that a new form of agreement would be used in the event the school boards desired use of our space. If you would be so good as to furnish us with a copy of this agreement for our use, we would greatly appreciate it.

Yours very truly,

Charlton D. Putnam
Director

RCC:mjh

Form SP-1913

Lease for Tenant Activity and Other Non-Commercial Space on (Federally Owned War Housing Projects Operated by Local Authorities).

1. Under the terms of this lease, made this 30th day of August, 1951, between the Dayton Metropolitan Housing Authority (herein called the "Lessor"), and Board of Education, Dayton, Ohio (herein called the "Lessee"), and subject to the conditions hereinafter set forth,

2. The Lessor does hereby let to the Lessee, and the Lessee hereby hires for the sole purpose of SCHOOL PURPOSES, the premises comprising part of Project No. OH 33155, located at De Soto Bass Courts, Dayton, Ohio, and described as follows: Small Community Building, rooms, and total leased sq. ft. area (2800 sq. feet) together with fixtures, equipment and supplies as set forth in the inventory which is attached hereto;

3. To Have and to Hold the Premises unto the Lessee, for the term of one School year, beginning on the 10th day of September, 1951 and ending on the .... day of June, 1952 at the rent and subject to the conditions as follows:

4. Rent. The Lessee shall pay to the Lessor the sum of $ * rent per month and the sum of $ * per month to cover the cost of utilities as provided in Section 4a below, for each calendar month until this lease is properly terminated. Rent shall be paid in advance on the first day of the month to Dayton Metropolitan Housing Authority and shall be in the form of a check or money order payable to the order of Dayton Metropolitan Housing Authority.

* $130.50 for Heating Months and $97.50 for Non Heating Months, (Heat, Utilities & Janitorial furnished by Lessor).

In the event the payment of rent commences on any date other than the first day of a calendar month, or in the event this lease is terminated on any date other than the last day of any calendar month, the rent shall be prorated on a daily bases over the period during which the Lessee actually uses or occupies the Premises.

4a. *Utilities.* The Lessor will make available all normal utility services, including heat, water, gas and electricity required for the proper operation of the premises as equipped. The Lessee shall pay costs or estimated costs for utility services furnished by the Lessor and consumed by the Lessee in connection with the use and occupancy of the premises.

4b. *Janitorial Services.* The Lessee shall furnish janitorial services or pay the cost of such services provided by the Lessor.

5. *Compliance with Local Laws.* The Lessee shall, at its own expense obtain all necessary licenses and permits, and comply with all applicable laws and ordinances which may be promulgated by the United States, the State of Ohio or any political subdivision or agency thereof.

6. *Alterations and Fixtures.* The Lessee, at its own expense, may make any necessary or desirable alterations or remodeling on the premises and may install fixtures and equipment appurtenant to the Lessee's operations, provided that no alteration or remodeling shall be undertaken without the prior written consent of the Lessor.

7. *Repairs and Maintenance.* The Lessee shall keep in good order the premises both exterior and interior, and shall maintain the interior and all appurtenances in good repair during the terms of this lease.

8. *Restoration and Surrender of Premises.* The Lessee, upon the termination of this lease, agrees (a) to remove all fixtures, equipment, and supplies installed on the premises by the Lessee; (b) to restore the premises to the same physical condition as they were at the beginning of the term, and surrender to the Lessor the premises in as good order and condition as when accepted, ordinary wear and deterioration excepted; and (c) to deliver to the Lessor all fixtures, equipment and supplies furnished by the Lessor as set forth in the attached inventory or an identical number of items of like kind and quality.

9. *Signs.* All exterior signs, displays, and advertising on the premises must be approved by the Lessor prior to installation.

10. *Subleasing.* The Lessee shall not sublease the premises without the prior written consent of the Lessor.

11. *Right of Entry.* The Lessor, acting through its agents, representatives or employees, shall have the right to enter upon the premises at any time during reasonable hours for the purpose of making inspections.

12. *Default and Reentry.* In the event of any default by the Lessee in the payment of any rent or other charges when due, or in the event of any breach of any other condition of this lease, the Lessor at its election, may terminate this lease and all rights of the Lessee hereunder by giving 30 days notice to the Lessee. Upon termination at the end of thirty (30) days, the Lessor, its agents or representatives shall have the right, without further demand or notice, to re-enter and take possession of the premises.

13. *Damage to Premises.* In the event the premises are rendered partially or wholly unfit for their use under the terms

of this lease by fire, tornado, earthquake or other casualty, this lease shall be automatically terminated as of the date of such happening. In such event the fixed rent herein provided for shall abate from the date of the happening of such casualty. There shall be a prompt accounting of the rent accrued to the date of termination, and any moneys disclosed to be owing the Lessee under the terms of this lease shall be promptly paid by the Lessor.

14. *Termination.* Either the Lessor or the Lessee may terminate this lease on thirty (30) days prior notice in writing to the other party, except that the Lessor shall not terminate a school lease during the school term unless the project is to be terminated at that time.

15. *Indemnity.* The Lessee will indemnify and save harmless the Lessor from all liability, claims, damages, or causes of action arising out of the Lessee's possession, use, maintenance, and operation of the premises or the fulfillment of its responsibilities in connection therewith.

16. *Notices.* Any notice desired or required to be given by the terms of this lease to the Lessor by the Lessee shall be given in writing addressed to Dayton Metropolitan Housing Authority at 702 Harries Building, Dayton 2, Ohio.

Any notice desired or required to be given by the terms of this lease to the Lessee by the Lessor shall be given in writing addressed to Board of Education, 232 N. Main Street, Dayton, Ohio.

17. *State Jurisdiction.* No provision of this lease shall be construed as depriving the State of Ohio or any political subdivision thereof of its civil and criminal jurisdiction over the premises.

18. *Members of Congress.* No member or Delegate to Congress, or Resident Commissioner shall be entitled to any share or part of this lease or any benefit that may arise therefrom.

19. *Non-Discrimination.* There shall be no discrimination

by reason of race, creed, color, national origin or political affiliations, against any employee or applicant for employment qualified by training and experience, for work in connection with this lease.

The Lessee shall include the foreging provision in all contracts for any part of the work under this lease.

IN WITNESS WHEREOF, the Parties have executed this instrument on the 30th day of August, 1951.

Dayton Metropolitan Housing Authority, Lessor
By Director

Board of Education, Dayton, Ohio
By Clerk-Treas.

Witnesses:
/s/ VIRGINIA M. CARTER

Plaintiffs' Exhibit 143J

[LETTERHEAD OF DAYTON BOARD OF EDUCATION]

July 28, 1953

Charlton D. Putnam, Director
Dayton Metropolitan Housing
Harries Building
Dayton 2, Ohio

Dear Sir:

I am taking this opportunity to Express the thanks of the Dayton Board of Education for the privileges which your organization has given them in granting them the use of your facilities for classes during the past years.

It has been a great help and a pleasure to use your building during this school housing emergency and we appreciate the many courtesies extended to our teachers and children.

With the rapidly increasing population in the city of Dayton we cannot tell just how soon we may have to ask your help again.

Sincerely yours,

/s/ F.G. CARLSON
F. G. Carlson, Asst. Supt.
Business Department.

Plaintiffs' Exhibit 143J

[LETTERHEAD OF THE DAYTON BOARD OF EDUCATION, 232 N. Main Street, Dayton 2, Ohio]

TO: Dayton Metropolitan Housing Authority – De Soto Bass Harries Bldg., Dayton 2, Ohio.

RE: Kindergarten sessions – 1949-50.

This form is being sent to you to confirm verbal agreement and letter of acceptance from your church for the use of one or more classrooms and furniture for 1 sessions, including the following services:

School Wogaman

Heat X Light X Sanitary Facilities X
Use of playground X Janitorial Services X
Other

The Board of Education is to be billed at the end of each month in the amount of:

$60.00 per 4 week month – non-heat months
$75.00 per 4 week month with heat

The Board of Education wishes to thank you for your co-operation in helping to temporarily solve the over-crowded conditions of our schools in your community.

/s/ F. G. CARLSON
F. G. Carlson, Asst. Supt.
Business Department.

August 1949. Date

Plaintiffs' Exhibit 143J

[LETTERHEAD OF THE DAYTON BOARD OF EDUCATION, 232 N. Main Street, Dayton 2, Ohio]

TO: Dayton Metropolitan Housing Authority – McGuffey Homes
Harries Bldg., Dayton 2, Ohio.

RE: Kindergarten sessions – 1949-50.

This form is being sent to you to confirm verbal agreement and letter of acceptance from your church for the use of one or more classrooms and furniture for 2 sessions, including the following services:

School McGuffey

Heat X Light X Sanitary Facilities X
Use of playground X Janitorial Services X
Other

The Board of Education is to be billed at the end of each month in the amount of:

$57.95 per 4-wk. month – non-heat months
$91.35 per 4-wk. month – with heat

The Board of Education wishes to thank you for your co-operation in helping to temporarily solve the over-crowded conditions of our schools in your community.

/s/ F. G. CARLSON
F. G. Carlson, Asst. Supt.
Business Department.

Sept. 8, 1949. Date

Plaintiffs' Exhibit 143J

[LETTERHEAD OF THE DAYTON BOARD OF EDUCATION, 232 N. Main Street, Dayton 2, Ohio]

TO: Dayton Metropolitan Housing Authority – McGuffey Homes
Harries Bldg., Dayton 2, Ohio.

RE: Kindergarten sessions – 1949-50.

This form is being sent to you to confirm verbal agreement and letter of acceptance from your church for the use of one or more classrooms and furniture for 2 sessions, including the following services:

School McGuffey

Heat X Light X Sanitary Facilities X
Use of playground X Janitorial Services X
Other

The Board of Education is to be billed at the end of each month in the amount of:

$57.95 [$56.50]* per 4 wk month – non-heat months
$91.35 [$88.00]* per 4 wk month – with heat

The Board of Education wishes to thank you for your co-operation in helping to temporarily solve the over-crowded conditions of our schools in your community.

/s/ F. G. CARLSON
F. G. Carlson, Asst. Supt.
Business Department.

August 1949. Date

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* Figures in brackets marked out on original copy.

PLAINTIFFS' EXHIBIT 150I

Dayton Public Schools
Racial Composition

School	Year	Black Student Composition	Black Teacher Composition
Garfield	1935	Approx. 50% black	Approx. 60% black
	1936	95% or more black	100% black
Wogaman	1943	Approx. 67% black	0% black
	1944	Approx. 90% black	0% black
	1945	95% or more black	100% black
Dunbar High	1933	100% black	100% black
Willard **	1934	Approx. 50% black	38% black
	1935	95% or more black	100% black

Sources: School directories and interviews with school personnel involved in the situations cited.

WPC:dw
111072

PLAINTIFFS' EXHIBIT 157C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

DEPOSITION OF DR. WAYNE CARLE

DEPOSITION OF DR. WAYNE CARLE, taken before me, F. L. Seymour, Notary Public in Montgomery County, for the State of Ohio, pursuant to agreement of counsel, at 1:30 o'clock p.m., Monday, June 19, 1972, in the office of Dr. Wayne Carle, 348 West First Street, Dayton, Ohio.

• • •

[3] WHEREUPON:

Dr. Wayne Carle

the witness having been duly sworn, was examined and testified as follows:

MR. DIAMOND: We are convened today pursuant to agreement of the parties to take the deposition of Dr. Wayne Carle, pursuant to the Federal Rules of Civil Procedure in the case of Brinkman versus Gilligan.

DIRECT EXAMINATION

BY MR. DIAMOND:

Q Dr. Carle, there will be a pre-trial conference on Friday, in Judge Rubin's chambers, and Plaintiffs are particularly interested here today in exploring with you the necessity of immediate planning or the efficiency of having planning begin on the implementation of the desegregation plan which was previously adopted by the Dayton School Board, and to lay the background for that inquiry, if you would, please, could you briefly summarize the history of the resolutions and planning which led to adoption of that plan of desegregation?

A Yes.

MR. GREER: We object insofar as all this is a matter of record from the School Board minutes. Go ahead and proceed.

[4] THE WITNESS: The concern about racialization in the Dayton Schools dates back at least four years, but in particular, would be associated with several specific events. One was the notice received in the fall of 1958 of a compliance review by the Office for Civil Rights of the Department of Health, Education, and Welfare, which constituted a study of the Dayton Schools, as continued to the present, and resulted in the following spring in a letter notifying the district that it was in non-compliance with respect to the assignment of schools, expressing concern for the substantial neutrality of enrollment of pupils in the school, and asking that the district take action to rectify it.

The Board of Education subsequently adopted the resolution notifying the federal government that staff would be desegregated, and under a separate action, applied for a federal grant for the purpose of studying the pupil segregation and other aspects of the problem of desegregation. This would be in 1969. At about the same time, a citizen's committee, which was called the Citizens Advisory Council to the Dayton Board of Education, studied all aspects of school operation, and considered as part of its task, the problem of racialization.

As the result of those initial activities, the desegre- [5] gation of staff was undertaken, and essentially completed this last fall, the fall of 1971, and a series of studies made of enrollment patterns of approaches to human relations, including in-service education of administrators and teachers, and finally, a resolution by the Board of Education in the spring of 1971 — I should precede that by saying that in December of 1970, a complete report up to that point was submitted under the title "School Integration," noting that there were many alternatives that could be explored, all the way from doing nothing, to completely desegregating the schools, and then in the spring of 1971, a Board resolution noted the problem of racialization, called upon the State Department of Education to make recommendations regarding alternatives available for reducing racial and economic isolation of pupils, and authorizing the President of the Board to establish a citizens committee, which subsequently became known as the Committee of 75, to examine the recommendations of the State Department of Education, and make recommendations to the Board of Education.

That committee then embarked upon a series of meetings and studies which culminated in late autumn with a report entitled "Report of the Committee of 75," which not only summarized the activities of that committee, but noted racialization as being the number one problem in the Dayton [6] schools, and urging the Board to proceed with solutions to it. Subsequent to that report, the Board then acted upon, in December of 1971, three resolutions that were designed, first, to call upon the Greater Dayton community to recognize the problems of racial and economic isolation in housing, employment, and education, and to join in bringing about justice and equality, and, secondly, calling upon the State Department of Education to require all the school districts in the metropolitan area, planning for the ending of racial and economic isolation, and requiring them to implement those plans by September of 1973, and in the third resolution, rescinding the present attendance boundaries of the Dayton Schools, setting

up criteria for the desegregation of schools, and directing the superintendent to develop and implement a plan for integrating the Dayton Schools by September of 1972.

BY MR. DIAMOND:

Q Let me interrupt you here, Dr. Carle. How long have you been with the Dayton Schools?

A Four years.

Q And in that four-year period, what was your position?

A Superintendent of schools, the chief executive officer of the Board of Education.

Q And could you give me the date, approximately, when you [7] started in that position?

A June 10, 1968.

Q And what did you do before then?

A I was assistant state superintendent of public instruction.

Q For the State of Ohio?

A For the State of Ohio.

Q And what did you do before then?

A I was assistant superintendent of the Akron Ohio Schools.

Q And how long had you been in those two positions?

A Two years in the State position, and seven years in the Akron position.

Q And what was your background before that?

A High school and college teacher.

Q And what systems?

A In Utah; Provo, Utah, and in Dushane, Utah.

Q What is your educational background?

A Bachelor and Master Degrees in English and educational administration from Brigham Young University in Utah. A Ph. D. Degree in education at Ohio State University.

Q In your educational background, and in your experience in these various positions, have you come to be familiar with all phases of educational administration at the elementary and secondary level?

A I believe so, insofar as is possible for one to be [8] familiar with all phases today.

Q I have here three documents. Would you tell me what they are?

A These are marked one, two and three, and constitute resolutions adopted by the Board of Education as I described, calling upon area cooperation, State Board of Education and the State of Ohio action, and local district action to desegregate the schools.

Q Are these the resolutions that you referred to that were adopted by the Board in December of 1971?

A Yes, they are.

Q I am going to read a statement from these resolutions, and ask you a question based thereon. "This Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and in-actions of this and predecessor Boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs. That this Board recognizes that past actions or in-actions of the Board of Education and residential racial segregation are interdependent phenomena. Segregated educational opportunity and unequal educational opportunities [9] for minority and poor students now exist in the Dayton public schools, and this inequality exists as a result of the acts and omissions of this Board and preceding Boards in their decisions concerning the site selection of school buildings, size of school buildings, changes and adoptions of school attendance boundaries, pupil assignment practices, faculty and staff hiring and assignment practices."

Q Dr. Carle, in your experience as four years of the superintendent of the Dayton public schools, do you agree with the sum and substance of those resolutions?

MR. GREER: I object.

MR. HOLSCHUH: For the record, I feel that I should note an objection. First, on the basis that the proported reso-

lutions from which you have apparently read are not in evidence, and secondly, and certainly more importantly, you are seeking to get from this witness his personal opinion as to whether he concurs in the opinions of somebody else as set forth in that resolution. I would have no objection, of course, to any questions that you want to ask Dr. Carle concerning the facts, statistics, figures, but the objection goes to your calling for an opinion and conclusion of this witness.

[10] MR. GREER: We have the same objection on behalf of the Dayton Board of Education.

MR. FLEISCHAUER: I will enter the same objection on behalf of Dr. Carle.

BY MR. DIAMOND:

Q The witness may now answer the question.

A In the past four years, I have had considerable opportunity to review the history of the school district, and to be acquainted with the present condition of the schools. The paragraphs to which you alluded had to do with the impact of Board actions or in-actions through policy or procedure, the relationship of housing, and the impact of other governmental policies or procedures through housing, and the relationship of the operation of the schools to the education of boys and girls in the city district in relation to these actions or in-actions.

In each case, I would support that the allegations made in those paragraphs are factual, and that they are at the heart of the confronting education in urban centers of this country.

MR. HOLSCHUH: I move to strike, for the reasons I previously stated, and for the additional reason that the witness answer is clearly based upon what he has read or heard, and founded upon hearsay.

[11] MR. GREER: We will have the same motion. I think it's clear from the witness's answer that he is referring to a generalized state of affairs throughout the whole country, more than any specific thing the School Board of Dayton did or failed to do.

BY MR. DIAMOND:

Q Dr. Carle, does your answer reflect your personal experience here in Dayton?

A Yes. I thought I had emphasized that in the preamble, that the judgment is based upon my experience with the schools as they now are, and as the records indicate they have been.

MR. HOLSCHUH: The same motion.

MR. GREER: To save time, would it be agreeable to all concerned that if one party makes an objection, it will stand as the objection for all of the defendants, unless somebody speaks up and disaffirms it?

MR. DIAMOND: That's fine with us.

BY MR. DIAMOND:

Q In your answer, Dr. Carle, you referred to not only your personal experience, but your examination of records. Were those the records of the Dayton schools which are under your possession?

[12] A Yes.

Q In the resolution of December, 1971, in relationship to the planning, what were the basic criteria that were set up by the school board in attempting to achieve desegregation of the Dayton schools for September, 1972?

MR. HOLSCHUH: You are referring to what is in the resolution, Mr. Diamond?

MR. DIAMOND: Yes.

BY MR. DIAMOND:

Q You were directed, I understand, according to your answer, by the Board to undertake that planning, and I am asking you now, what were the criteria upon which you undertook that planning? What steps did you take? Did you hire outside consultants? Did you do it yourself? How did that proceed from December of 1971?

A The basic criterion was that no building would have a racial composition or family income characteristic which was substantially disproportionate to the district as a whole. In other words, that each school would reflect roughly a cross section of the school district. The records to which I referred earlier in the reports, particularly had examined a number of desegregation plans and implementations across the country over the past two or three years, so that we were aware of a number of factors which appeared [13] to be useful and successful, and some perhaps which were less justifiable, and so that I was interested, when the Board gave me the assignment of developing a plan, in including the very best qualities that could be set forth in relation to experience in other urban centers, particularly.

I had heard that Dr. Gordon Foster, at the University of Miami, had been involved in several of those plans, and had also, of course, previously resided in this area while a member of the University of Miami, Ohio. I, therefore, immediately contacted Dr. Foster to see whether he would have time to assist us with planning, since he is also director of the school desegregation center in Miami, and he was willing to make his experience available, although it was done as an individual, not as an activity of that center.

He then drew together a planning team, and came to Dayton to examine the district, the buildings, the records, and after amassing that information, returned to Florida and worked on a draft of the plan, which we then reviewed with the members of my staff, and was finally formulated into a proposal which I approved on January 3, I believe, of this year, 1972.

In that process, Dr. Foster consulted widely in the community [14] with various community leaders, as well as conversations with persons on the street and in the schools, with particular reference to minority points of view, as well as to the establishment points of view, and developed a plan which incorporates many positive features that have proven desirable elsewhere. Among these are the continued –

MR. HOLSCHUH: Excuse me, Dr. Carle, but I would object. I don't think that's responsive. I think Mr. Diamond's question was, what did you do as a result of the Board resolution.

MR. DIAMOND: To the contrary, I think it is responsive.

THE WITNESS: May I continue?

MR. HOLSCHUH: Aren't you now asking him for his opinion of the plan?

MR. DIAMOND: I presume he is telling me – He just said he recommended the plan to the Board. He is giving me the reasons. This presumably goes in to his response to the Board's call upon him.

MR. HOLSCHUH: Well, I understood your question was, what action did he take in response to the Board's call, and I expected his answer to be limited to that action. Note my objection. Go ahead, Doctor.

[15] THE WITNESS: I was attempting to illustrate the extent to which the consultation had taken into account plans elsewhere.

BY MR. DIAMOND:

Q Did your planning and your consultation with Dr. Foster, and did Dr. Foster have access to and the benefit of the previous planning of, say, the Committee of '75?

A Yes, all the pertinent records to which I referred to earlier were made available to Dr. Foster, and in addition to that, he visited school buildings, collected additional records from our operation, such as the Ohio State University building facility survey, which had been completed the year before, and as I say, consulted with groups in the community. Then the point I was trying to make with regard to the nature of his planning, and the criteria that we used, one feature was that students continued to attend schools as a neighborhood group. That assignment to school would have been by neigh-

borhood areas. That roughly proportional groups of white and black and high and low income students would have been moving, so that no one group assumed anymore burden or sacrifice of the plan than another, and that it was not necessary to assign any pupil to a building on the basis of individual characteristics of race or income, but rather on a group criteria that would certainly not depart [16] from any past practice or guarantee of individuality.

Q I show you a document. Would you describe what that is?

A This is entitled "Desegregation Study, Dayton Public Schools, Dayton, Ohio," and is the plan developed by Dr. Gordon Foster, and submitted to me pursuant to the direction I received from the Board of Education.

Q Is that the plan, then, that you recomemnded that the Board of Education adopt?

A It is.

Q And was that recommendation based on the criteria which you have mentioned?

A May I re-reply to your question?

Q Yes.

A Could I have the question back?

(Whereupon, the question referred to was read by the Reporter.)

THE WITNESS: May I change that answer?

MR. DIAMOND: Sure.

THE WITNESS: I did not recommend it to the Board, since the Board had already given me both the direction and authority to plan and implement desegregation of schools. I simply announced publicly that this plan was adopted, and was in the process of being implemented. [17] There was no necessity for Board action on the plan.

BY MR. DIAMOND:

Q Was that decision based upon the criteria which you have mentioned?

A Yes, it was.

Q Based on those criteria and the plan, in your experience, is the plan both educationally sound and administratively feasible?

MR. HOLSCHUH: Objection.

THE WITNESS: Yes.

BY MR. DIAMOND:

Q What, then, happened, Dr. Carle, in terms of the history if you can bring us up-to-date?

A The Board of Education had three new members after the acceptance of this plan, and subsequent to that, adopted resolutions designed to rescind the previous action of the Board, and indeed the resolutions were somewhat parallel in construction, except worded in the negative, and substituting other actions, rather than the desegregation of schools.

Q And when that occur, approximately?

A In January. I do not recollect whether it was the first or second meeting of the Board.

Q In terms of the plan, which I will describe as that of [18] January 3, 1972, to desegregate the Dayton Public Schools, would it be beneficial for implementation for the fall of 1972, if the details of the planning began as soon as possible.

MR. HOLSCHUH: Objection.

MR. GREER: The same objection.

THE WITNESS: It is desirable to have as much lead-time in planning as possible, but the plan itself is reasonably complete, and requires only detail work to be placed into effect, so that time is not really of the essence, other than it would be desirable to have as much lead-time as possible for information, and for community involvement purposes.

BY MR. DIAMOND:

Q Let me ask the question this way: As the Chief Administrative Officer of this school system, would it be helpful to you in the procurement of transportation, in the notification to

students of assignments, to have it known, if you were going to implement the plan in the fall of 1972, to have that knowledge imparted to you, June 31, as opposed to August 31?

A Definitely. The original intent, of course, was that the time from January through September would have beeen available for that implementation, and obviously, the closer it gets, the more intensified would be the preparations [19] that would have to be carried out.

Q In your opinion, Dr. Carle, do you believe that the plan, as of this date, can be implemented for fall of 1972?

A I base my answer on the fact that more complicated plans have been implemented in other communities in less time than now remains between now and September. I would say yes.

MR. DIAMOND: I have no further questions.

CROSS EXAMINATION

BY MR. GREER:

Q Dr. Carle, let me try to get some of the chronology straight on some of these events. What was the meeting, or what was the date of the meeting, in December of 1971, when these three resolutions you have discussed with Mr. Diamond were contracted by the Board?

A I believe the date was December 8.

Q Prior to that time, there had been an election of three new Board members, had there not?

A In November there had been an election, yes.

Q And it was known at the time of the meeting of December 8, who the three new Board members would be, and that they would take office on January 1 of 1972?

A That's correct.

• • •

PLAINTIFFS' EXHIBIT 157D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

Civil Action No. 72/137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

DEPOSITION OF MARTIN W. ESSEX

DEPOSITION OF MARTIN W. ESSEX, a witness of lawful age, taken on behalf of the Plaintiffs in the above entitled cause, pursuant to stipulation, before Sara W. Stewart, a Notary Public in and for the State of Ohio, at the offices of Beiser, Greer & Landis, 8 N. Main St., Dayton, Ohio, on the 11th day of November, 1972, at 10:00 o'clock a.m.,

APPEARANCES:

On behalf of the Plaintiffs: Louis Lucas, Attorney at law, 61 Kirkland St., Cambridge, Massachusetts;

On behalf of the Defendant, the Dayton Board of Education: Beiser, Greer & Landis, by David C. Greer, Attorney at law, 2nd Floor, 8 N. Main St., Dayton, Ohio;
On behalf of the Defendants, the State Board of Education, and Dr. Martin Essex: Alexander, Ebinger, Holschuh & Fisher by John D. Holschuh & Alvin J. McKenna, Attorneys at law, 1120 Huntington Bank Bldg., Columbus, Ohio.

• • •

Plaintiffs' Exhibit 157D

[p. 54]

Q Well, let's assume by segregation we mean some sort of State action that caused this to happen, and let's talk first of all, just in purely racially isolated, regardless of how it got that way.

A In Ohio?

Q Let me ask you what you would consider a school to be when you would consider a school to be racially isolated in that context?

A We would consider it to be racially isolated from the standpoint of the State Department of Education when this had resulted from the actions of some legally constituted body which had separated races.

Q So when the State Department uses that term that is what they mean?

A This would be – We only see it through – we do not construe the neighborhood school concept as, or a neighborhood school as one which is racially segregated if we can relate it to the terms of legal factors as having been caused by some legal action. In Ohio segregation from a legal point of view was abolished many, many years ago, somewhere in the prior century, just as at Oberlin College, and on and on. Ohio has not had segregated schools on a legal basis so far as . . .

PLAINTIFFS' EXHIBIT 161A

Motion to adjourn to Monday, June 5, 1933 . . .

MONDAY, JUNE 5, 1933
ADJOURNED MEETING

President Stephens in the chair

MEMBERS ANSWERING ROLL CALL – 7
MEMBERS ABSENT – 0

RESOLVED THAT the Paul Laurence Dunbar School be opened and occupied at the beginning of the next school year, and that the Superintendent be instructed to proceed with the necessary steps in equipping this school for occupancy, and

BE IT FURTHER RESOLVED that the 7th and 8th grades at the Garfield and ——— schools be discontinued, and that attendance at the Paul Lawrence Dunbar School be ——— for all junior high school students of the 7th, 8th, and 9th grade levels in the ———.

PLAINTIFFS' EXHIBIT 161B

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF DAYTON, OHIO

THURSDAY, JUNE 11, 1942
REGULAR MEETING

Due to emergency housing conditions in the city, it will be necessary for the Board of Education to approve certain adjustments in pupil assignments for the coming year. Therefore,

BE IT RESOLVED THAT the Board of Education authorize the Superintendent of Schools to assign the pupils from the eighth grade at Webster and McGuffey Schools to the Kiser High School.

BE IT FURTHER RESOLVED THAT the seventh grade pupils from the Willard and Garfield Schools be assigned to Dunbar High School.

BE IT FURTHER RESOLVED THAT the school children in the De Soto Bass Courts, Grades 1-6, be assigned to the Wogaman School.

The vote was taken on the adoption of the foregoing resolution, with the following result.

Cook, Eberhart, Schenck, Mrs. Wineland, and Wortman, — 5 yeas.

So the President declared the resolution adopted.

PLAINTIFFS' EXHIBIT 162

[LETTERHEAD OF STATE OF OHIO, DEPARTMENT OF EDUCATION, COLUMBUS 43215]

November 17, 1972

Mr. John D. Holschuh
Alexander, Ebinger, Holschuh, Fisher and McAlister
17 South High Street
Columbus, Ohio 43215

Mark Brinkman, et al
vs.
John J. Gilligan, et al

Dear Mr. Holschuh:

The following information was requested by Louis R. Lucas of Dr. Martin W. Essex during his deposition on November 11, 1972 in Dayton:

1) School foundation payments to the Dayton City School District during Fiscal Years 1972 and 1973.

2) Judge William Ammer's decision regarding Bloomfield-Mespo and Farmington charter revocations.

3) State Board of Education resolution regarding Bratenahl Local School District.

4) Federal funds allocated to the Dayton City School District by the State Department of Education.

Please be advised that during Fiscal Year 1972, the Dayton City School District received a total of $9,525,492 through the State Foundation Program. Based upon July estimates of enrollment and staffing levels, the Dayton City School District will receive $11,521,673.84 during Fiscal Year 1973. Actual Fiscal Year 1973 payments to Dayton will not be known until adjustments are made in January, 1973.

Plaintiffs' Exhibit 162

Attached herto are the other items requested.

Sincerely yours,

/s/ G. R. BOWERS
Assistant Superintendent
GRB:j

DEFENDANTS' EXHIBIT B

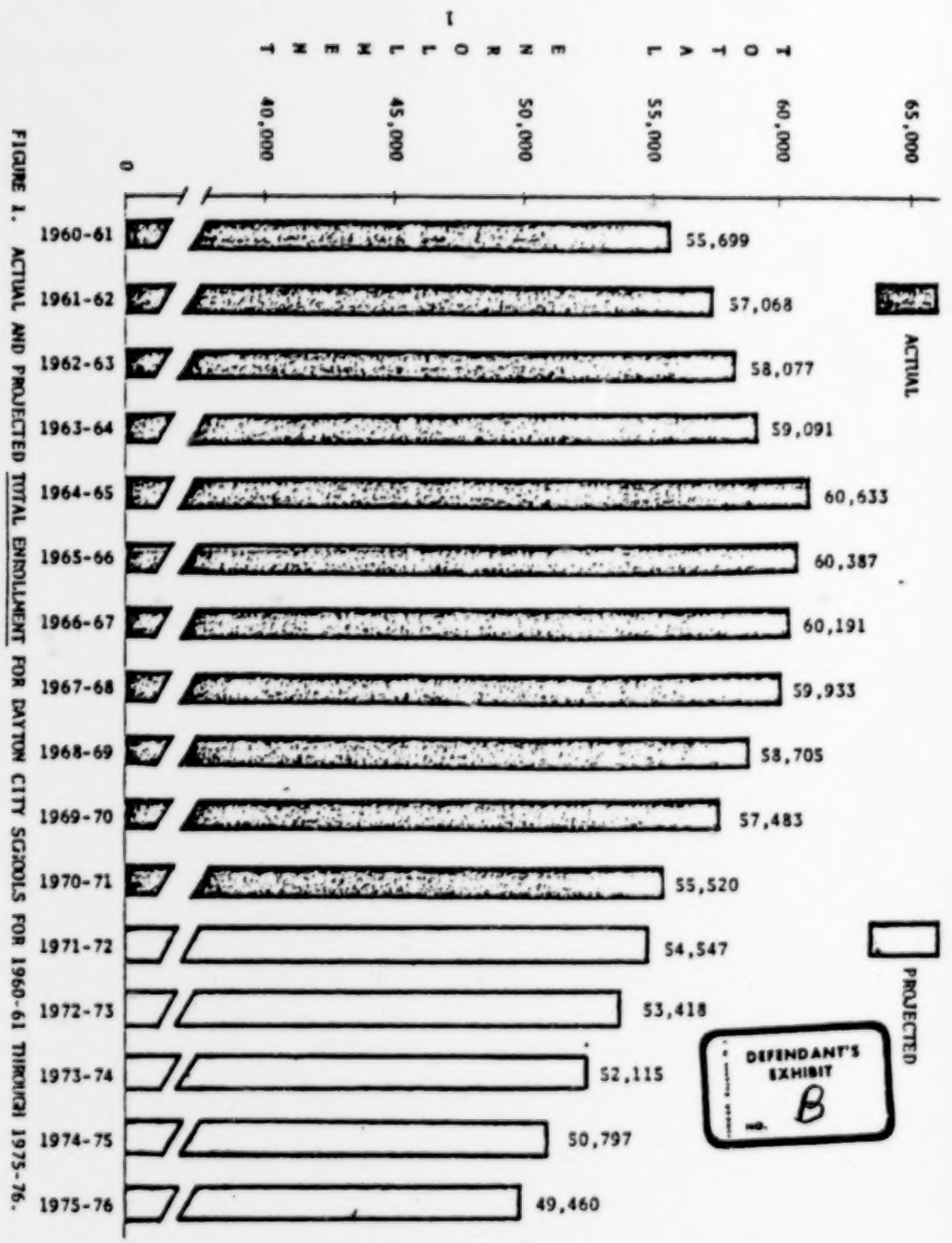

FIGURE 1. ACTUAL AND PROJECTED TOTAL ENROLLMENT FOR DAYTON CITY SCHOOLS FOR 1960-61 THROUGH 1975-76.

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DEFENDANTS' EXHIBIT D

THURSDAY, AUGUST 25, 1966 -- REGULAR MEETING

The following school transportation policy as prepared by William Goff, Director of Pupil Personnel Services, was recommended for approval by Robert B. French, Superintendent of Schools:

DAYTON CITY SCHOOL DISTRICT
SCHOOL TRANSPORTATION POLICY

I. Elementary School Pupils (Grades K-8)

A. Any elementary grade student (except kindergarten) whose residence is more than 1.2 miles radial distance from his school of attendance will be transported to that school from designated pick-up points.

1. Such transportation *will be* provided when the school of attendance is less than *thirty (30) minutes direct travel time* by school bus from the designated public school collection point.
2. Upon the recommendation of the Superintendent of Schools and approval by the Board of Education, transportation for elementary pupils *may* be provided with the 1.2 mile radius distance where high hazard conditions exist and the safety of the student is endangered.
3. Transportation *may* be provided for kindergarten students where the area of residence is being served and when room on the bus is available.

II. High School Pupils (Grades 9-12)

A. Transportation *will be* provided for high school pupils whose residence is more than two (2) miles radial distance from the school of attendance provided further that:

1. The residence of the pupil is more than 1.2 miles direct travel distance to the nearest city public transportation line, AND
2. the travel time by city public transportation is more than forty-five (45) minutes to the designated school of attendance AND
3. the public school collection point is within thirty (30) minutes direct travel time by school bus.

B. Upon the recommendation of the Superintendent of Schools and approval by the Board of Education transportation *may be* provided for high school pupils to the designated school of attendance in the neighborhood or parish district within the two-mile radial distance where unusual conditions of hazard and safety exist.

III. Crippled Pupils

Transportation will be provided to the school of attendance for all children who are so crippled that they are unable to walk to and from school.

August 25, 1966

It was moved by Mr. Farrier, seconded by Mr. Lucas, that the above transporation policy be approved as recommended.

YEAS: Members Farrier, Lucas, Martin, Murr, Shellabarger, and Kline – 6
NAYS: None

This is a certified true copy of an entry in the Minutes of the August 25, 1966, meeting of the Board of Education, Dayton City School District, Dayton, Ohio.

.....
HAROLD L. HOWARD,
Clerk-Treasurer

THURSDAY – AUGUST 21, 1969 – REGULAR MEETING

[AMENDMENT
TO SCHOOL TRANSPORTATION POLICY]

That Section 1-A of the School Transportation Policy be amended to read as follows:

Any elementary grade student (except kindergarten) whose residence is more than 1.5 miles direct travel distance from his school of attendance will be transported to that school from designated pick-up points.

It was moved by Rev. Price, seconded by Mr. MARTIN, that the above amendment to the School Transportation Policy be adopted as recommended by the Supt. of Schools.

YEAS: Lucas, Martin, Price, Shellabarger, and Levy – 5
NAYS: None

The motion was declared approved.

This is a certified true copy of an Amendment adopted by the Dayton Board of Education on August 21, 1969.

/s/ HAROLD L. HOWARD
Clerk-Treasurer

DEFENDANTS' EXHIBIT E

TRANSPORTATION PROGRAM

Year	1966-67	1967-68	1968-69	1969-70	1970-71	1971-72
Total Number of buses operated daily for regular students average for AM & PM	47	60	56	50	35	31, 13 for FOE 2nd sem.
No. of St. John Buses - average AM & PM	47	60	56	50	22	18
No. of Board owned buses	0	0	0	0	13	13
Total No. of Students Transported	4,601	5,333	5,948	6,070	5,492	5,404
No. of Public Students Transported	3,110	3,709	4,572	4,683	4,134 (1,281)*	3,399 (1,347)*
No. of Non-Public Students Transported	1,390	3,499	1,228	1,168	956 (479)*	820 (435)*
No. of Freedom of Enrollment Students Transported (second semester)	0	0	0	0	0	530

* Denotes No. of Students Transported on Board Buses

DEFENDANTS' EXHIBIT N

THURSDAY – DECEMBER 10, 1959 –
REGULAR MEETING

Motion was made by Mr. Wortman, seconded by Dr. Light, that the 2 foregoing resolutions be adopted.

The vote was taken upon the adoption of the resolutions, with the following result:

Broaddus, Farrier, Light, Murr, Mrs. Shellabarger, Wortman, and Kline – 7 Yeas

Resolutions adopted.

Remarks were made by Mrs. Miley Williamson, executive secretary of the Dayton branch of the National Association for the Advancement of Colored People (NAACP), concerning the selection of the site for the proposed new Dunbar High School, withdrawing previous objections.

This is a certified true copy of an entry in the Minutes of the December 10, 1959, meeting of the Board of Education, Dayton City School District, Dayton, Ohio.

/s/ HAROLD L. HOWARD
Clerk-Treasurer

DEFENDANTS' EXHIBIT AB

[FREEDOM OF ENROLLMENT POLICY]

THURSDAY – MAY 29, 1969 – REGULAR MEETING

Rev. Price, presented the following statement to the Board:

This Board is committed to the achievement of quality integrated education for all pupils in the Dayton schools. Within the past month we have requested assistance from the State and Federal offices of Equal Educational Opportunity to explore every feasible means of moving toward this goal. Many individuals have expressed their desire to provide for children, learning opportunities that at present may be limited by housing patterns that may prevail in our urban centers. They may desire to enroll children in a school offering a course or student body composition not available within the attendance area of residence.

The need for additional classrooms exists in many areas of the city. Limited space within certain classrooms is available from time to time. Thus, voluntary transfers may assist in better utilization of all buildings.

For these reasons a policy statement on freedom of enrollment is proposed to make voluntary transfers available to all families within the school district.

Freedom of Enrollment Policy

A. **Transfer Within District**

The parent of a pupil in good standing enrolled in the Dayton Public School District may request assignment of the pupil to any school building within the district where space may be available to accomodate him. Such requests will be granted according to the following priorities:

Plaintiffs' Exhibit AB

1. Students residing within the attendance area of a school building shall have *first* priority to assignment to that building.
2. Students meeting the requirements for a course available only in the particular building shall have *second* priority for attendance in that building.
3. A student desiring enrollment in any building for whatever reason shall have *third* priority in that build-building providing his enrollment will contribute to improved racial balance in that building.
4. Transfer to another school within the city may be made at the beginning of a semester.
5. A permit to attend a school outside the attendance area of resident is valid until the end of the school year for which it is issued. It is *renewable on a year-to-year* basis depending upon availability of space in the receiving school. A student requesting renewed assignment shall have priority over new transfer requests.
6. Students desiring return to their home school district may do so at the end of a semester, unless an emergency situation arises, and will not be eligible for further free enrollment transfer.
7. An application for transfer may be obtained from and submitted to the principal of the home school district. All requests for transfer shall be forwarded by the principal to the Department of Pupil Personnel for action.
8. Transportation will be the responsibility of the parent.

B. **Student Exchanges Within the City**

1. Any two pupils, or group of pupils, attending schools within the district may voluntarily exchange places for a semester or a year if such exchange will improve the racial balance in the receiving schools.

2. Procedures shall be the same as for transfers as enumerated above.

Following completion of discussion during which time members of the audience, both proponents and opponents of the proposed policy statement, were heard; it was moved by Rev. Price, seconded by Dr. Carrell, that the Board endorse the Freedom of Enrollment Policy and that the Superintendent of Schools be authorized to make such policy known immediately so that enrollments may be made for the 1969/70 school year.

YEAS: Carrell, Martin, Price, Seaman, Shellabarger, and Levy – 6

NAYS: None

The motion was declared approved.

This is a certified true copy of an entry in the Minutes of the May 29, 1969, meeting of the Board of Education, Dayton City School District, Dayton, Ohio.

HAROLD L. HOWARD, Clerk-Treasurer
/s/ HAROLD L. HOWARD

DEFENDANT'S EXHIBIT NO. AI(a)

Staff and Pupil Data
for Selected Years

	1950-51						1951-52						1954-55						1956-57			
	Staff	Black	%	Pupils	Black	%	Staff	Black	%	Pupils	Black	%	Staff	Black	%	Pupils	Black	%	Staff	Black	%	No Pupil Data
Elem.																						
Jane Addams				405	123	30.4				443	130	29.3										
Allen				475	46	9.7				494	40	8.1										
Belle Haven					NA						NA					NA						
Belmont El.				1099	0	0				1147	0	0										
Brown				729	0	0				824	0	0							34.5	.5	1.4	
Carlson					NA						NA					NA						
Central				638	245	38.4				687	233	33.9							22.0	1	4.5	
Cleveland				701	0	0				711	0	0										
Cornell Hts.					NA						NA											
Drexel				742	189	25.5				737	213	28.9										
Eastmont					NA						NA					NA						
Edison				432	186	43.1				463	199	43.0	26	3	11.5				25.0	4	16.0	
Emerson				1158	24	2.1				1218	22	1.8	51	1	2.0				49.0	1	2.0	
Fairport					NA						NA											
Fairview El.				834	0	0				905	0	0										
Ft. McKinley				489	0	0				364	0	0										
Franklin				516	0	0				504	0	0										
Garfield	22	22	100	685	685	100	25	25	100	700	700	100	18	18	100				20.0	2WPT 20	Less than 100%	
Gardendale					NA						NA					NA						
Gettysburg				?	?	?				?	?	?										
Grant				365	0	0				400	0	0							3.0	1	3.2	
Greene				358	28	7.8				401	26	6.5							22.0	1	4.5	
Hawthorne				275	0	0				278	0	0										
Hickerydale					NA						NA					NA						
Highview					NA					?	?	?	21	1	4.8				28.0	5	17.9	
Huffman				785	0	0.0				774	1	0.1										
Irving				960	262	27.3				609	312	46.6							33.0	4	12.1	
Jackson El.				785	206	26.2				790	284	35.9	28	3	10.7				33.0	7.5	22.7	
Jackson Pr.					NA						NA											
Jefferson El.				953	0	0				946	0	0										
Jefferson Pr.					NA						NA											
Kemp				271	0	0				276	0	0										
Lewton				191	0	0				196	0	0										
Lincoln				676	0	0				646	0	0										
Longfellow				494	4	0.8				499	2	0.4										
Loos				506	0	0				504	0	0										
MacFarlane					NA						NA											
Horace Mann					NA						NA											
McGuffey				486	0	0				524	0	0										
McKinley					NA						NA		14	1	7.1					1		
McNary					NA						NA											
Meadowdale El.					NA						NA											
Miami Chapel					NA						NA		35	29	82.9				36.0	3W33 4WPT	Less than 91%	
Patterson El.				478	0	0				456	0	0										
Paulding & Pk. El.				412	0	0				462	0	0										
Residence Pk. Pr.					NA						NA											
Ruskin				600	2	0.3				596	2	0.3										
Shiloh				296	0	0				303	0	0										
Shoup Mill					NA						NA											
Louise Troy					NA						NA											
Valerie					NA						NA											
Van Cleve				506	0	0				483	0	0	20	1	5.0				22.0	1	4.5	
Washington				653	124	19.0				706	128	18.1							21.0	2	9.6	
Weaver				648	453	69.9	21	1	4.8	639	477	75.0	30	3	10.0				36.0	14	36.1	
Webster				706	0	0				624	0	0										
Westwood				960	1	0.1				931	1	0										
Willard	28	28	100	846	818	100	29	29	100	778	778	100	22	22	100.0				19.0	19	0	
Wheeler				515	115	22.5				938	141	20.0	20	1	5.0				27.0	5	18.5	
Wooster	33	33	100	1111	1111	100	35	35	100	1111	1111	100	33	33	100.0				42.0	1WPT	Less than 100%	
Orville Wright					NA						NA								34.0	1	4.2	
Hayes																						
Belmont					NA						NA											
Bunker	52	52	100	1032	1032	100	53	53	100	1018	1018	100	38	38	100.0				49.0	2WPT	Less than 100%	
Fairview				813	0	0				856	0	0							52.0	1	1.9	
Riser				910	7	0.8				923	5	0.5										
Meadowdale					NA						NA											
Patterson Co-op				634	5	0.8				708	8	1.1										
Paulding				3306	642	19.4				3407	750	22.0							88.0	2	2.3	
Rush					NA						NA											
Shipman				1139	9	0.8				1127	13	1.2							58.0	1	1.7	
Colonel White				879	0	0				854	0	0										
Wilbur Wright				1	44	1.1				1140	27	2.2							72.0	1	1.3	
[illegible]																						
[illegible]													115	5	4.1							
[illegible]																			4.0	1	25.0	
[illegible]																						
Newman				1	46	28.4				101	21	20.8										
Kennedy				99	3	3.4				92	1	1.3										

Division of Research
Management Services [illegible]

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DEFENDANTS' EXHIBIT AI(b)

Staff and Pupil Data
for Selected Years

	1958-59				1963-64 (Estimated)					1968-69				1969-70				
	Staff	Black	%	Pupils	Black	%	Staff	Black	%	Pupils	Black	%	Staff	Black	%	Pupils	Black	%
Elem.																		
Jane Addams							20	2	10.0	600	250	41.7	26	6	23.1		73.8	27	7	25.9		78.7
Allen							18	0	0.0	574	4	0.6	25	1	4.0		0.1	27	3	11.1		0.1
Belle Haven							37	0	0.0	1180	0	0.0	45	2	4.4		5.0	50	6	12.0		5.7
Belmont El.							26	0	0.0	794		0.0	27	1	3.7		0.0	27	2	7.4		0.0
Brown							39	0	0.0	1177	6	0.5	45	1	2.2		0.6	44	2	4.5		0.8
Carleon	9	9	100				10	10	100.0	244	234	95.9	25	21	84.0		99.0	27	7	74.1		99.7
Central	22	4	18.2				17.5	4	22.9	350	175	50.0	NA				NA	NA				NA
Cleveland							36	0	0.0	1180	0	0.0	45	1	2.2		0.0	47	3	6.4		0.1
Cornell Elem.							30.5	0	0.0	890	0	0.0	34	3	8.8		44.2	39	8	20.5		59.1
Drexel							23	0	0.0	700	25	3.5	26	2	7.7		5.7	31	8	25.8		4.1
Eastmont							28	1	3.6	950	0	0.0	37	1	2.7		0.0	33	4	12.1		0.0
Edison	26	5	19.2				26	6	23.1	800	640	80.0	18	16	88.9		97.3	25	15	60.0		98.3
Emerson							40	2	5.0	1000	0	0.0	43	4	9.3		6.8	42	6	14.3		13.6
Fairport							26	0	0.0	780	0	0.0	34	2	5.9		0.1	33	4	12.1		4.6
Fairview El.							28	0	0.0	667	7	1.0	34	2	5.9		1.7	32	3	9.4		3.7
Ft. McKinley							17	0	0.0	510	0	0.0	18	1	5.6		0.0	21	3	14.3		2.5
Franklin							23	0	0.0	691	0	0.0	37	1	2.7		0.0	37	2	5.4		0.0
Garfield	21	21	100					NA			NA			NA			NA		NA			NA
Gardendale							8	1	12.5	176	14	7.9	11	3	27.3		28.5	14	2	14.3		43.3
Gettysburg							19	1	5.2	630	0	0.0	26	1	3.9		5.2	21	4	16.0		6.6
Grant							31	1	3.2	917	0	0.0	32	2	6.3		0.1	30	2	6.7		0.9
Greene	23	5	21.7				23	11	47.8	715	640	89.5	26	21	80.8		96.8	31	17	54.8		97.5
Hawthorne							10	0	0.0	316	0	0.0	12	0	0.0		0.0	13	1	7.7		0.0
Hickorydale							18	0	0.0	565	0	0.0	22	0	0.0		6.6	25	3	12.0		16.3
Highview	28	5	17.9				30	16	53.3	807	662	82.0	36	21	58.3		97.0	34	17	50.0		98.2
Huffman							35	5	14.3	834	8	0.9	41	3	7.3		0.0	44	3	6.8		3.4
Irving	36	10	27.8				34	17	50.0	1035	1000	96.6	35	26	74.3		99.0	35	26	74.3		100.0
Jackson El.	33	9	27.3				31	23	74.2	1147	1130	98.5	39	33	84.6		99.1	41	32	78.0		99.5
Jackson Pr.							18	11	61.1	537	517	96.3	23	19	82.6		98.8	22	12	54.5		99.2
Jefferson El.							38	0	0.0	1284	16	1.2	44	8	18.2		60.1	36	14	38.9		80.3
Jefferson Pr.							—	—	—	—	—	—	NA	9	39.1		57.1	28	11	39.3		72.0
Kemp							24	0	0.0	725	0	0.0	28	0	0.0		0.0	27	2	7.4		0.0
Lawton							20	0	0.0	600	0	0.0	22	0	0.0		0.0	24	2	8.3		0.0
Lincoln							33	1	3.0	1145	0	0.0	43	1	2.3		0.0	43	4	9.5		0.2
Longfellow							28	1	3.6	850	50	5.9	40	7	17.5		42.3	45	9	20.0		50.2
Loos							27	0	0.0	785	15	1.9	29	1	3.5		4.6	30	4	13.3		5.0
MacFarlane							43	43	100.0	1229	1225	99.7	49	48	98.0		99.9	48	41	85.4		99.9
Horace Mann							15	0	0.0	435	0	0.0	14	0	0.0		0.2	14	2	14.3		7.0
McGuffey							34	1	2.9	925	0	0.0	36	1	2.8		14.4	37	6	16.2		18.9
McKinley																						
McNary								NA				NA	22	19	86.4		99.4	23	15	65.2		98.8
Meadowdale							29	0	0.0	930	0	0.0	31	1	3.2		8.0	29	4	13.8		12.8
Miami Chapel	28	25	89.3				29	27	93.1	793	790	99.6	33	29	87.9		99.9	37	28	75.7		99.6
Patterson El.							22	1	4.5	650	0	0.0	26	1	3.9		0.0	25	1	4.0		0.0
Residence Pk. El.							35	2	5.7	1113	890	80.0	34	23	67.7		98.8	35	17	48.6		99.2
Residence Pk. Pr.								NA				NA	16	11	68.8		99.3	15	10	66.7		99.5
Ruskin							38	1	2.6	1171	1	0.0	39	1	2.6		7.0	38	2	5.3		4.3
Shiloh							17	0	0.0	490	12	2.4	19	0	0.0		0.1	27	1	3.7		6.3
Shoup Mill							10	0	0.0	318	3	0.9	15	1	6.7		7.1	14	2	14.3		13.4
Louise Troy	25	25	100.0				28	22	95.7	781	780	99.9	20	20	100.0		100.0	29	25	86.2		99.7
Valerie								NA				NA	19	1	5.3		7.5	23	5	21.7		17.4
Van Cleve							25	2	8.0	770	7	0.9	34	1	2.9		1.1	32	5	15.6		1.7
Washington							21	2	9.5	650	150	23.0	27	4	14.8		19.4	27	6	22.2		16.6
Weaver	38	19	50.0				40	31	77.5	1266	1249	98.8	48	43	89.6		99.9	49	38	77.6		100.0
Webster							18	1	5.6	991	1	0.1	28	0	0.0		0.0	29	3	10.3		0.6
Westwood	45	1	2.2				64	20	31.3	1000	1800	94.7	64	42	65.6		99.4	60	24	36.7		99.5
Willard	22							NA			NA	NA					NA					NA
Whittier	32	11	34.4				32	14	43.8	925	884	95.6	33	21	63.6		99.2	31	17	54.8		99.3
Wiseman	39	39	100.0				37	37	100.0	1100	1100	100.0	41	40	97.6		100.0	42	33	78.6		100.0
Orville Wright							25	1	4.0	750	0	0.0	30	1	3.3		0.0	32	4	12.5		0.8
High																						
Belmont							70	1	1.4	1768	0	0.0	87	5	5.8		0.1	81	8	9.9		0.5
Dunbar	42	42	100.0				45	42	93.3	1130	1044	92.7	70	62	88.6		99.3	65	53	81.5		99.4
Fairview							53	1	1.9	1252	12	0.9	77	5	6.5		5.2	67	6	9.0		9.9
Kiser							38	2	5.3	740	20	2.7	46	2	4.4		1.8	43	3	7.0		5.4
Meadowdale							44	2	4.5	1154	1	0.0	79	4	5.1		1.1	75	5	6.7		1.4
Patterson Co-op							49	1	2.0	1020	19	1.9	95	3	3.5		18.3	95	4	4.2		12.2
Roosevelt	105	10	9.5				92	22	23.9	1321	1251	94.6	104	60	65.4		100.0	109	61	59.2		99.8
Roth							46	11	23.9	1120	660	58.9	69	50	72.5		92.3	63	29	49.3		94.9
Stivers							55	4	7.2	1150	30	2.6	53	3	5.7		6.6	58	4	6.9		3.9
Colonel White							68	4	5.9	1658	20	1.1	85	5	5.9		19.3	81	11	13.6		48.9
Wilbur Wright							53	3	5.7	1334	45	3.3	72	5	7.0		9.5	64	5	7.8		1.4
Special																						
Education																						
Principal Training																						
Clark																						
Gorman							7	1	14.3	92	16	15.5	14	0	0.0		21.1	16	2	12.5		7.4
Kennedy							18	5	27.8	144	20	13.8	23	6	26.1			20	5	25.0		

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DEFENDANTS' EXHIBIT AI(c)

Selected Summary for Staff and Pupil Data

Identification of Schools By Faculty Assignment

School	Year	% Black Staff	% Black Enrollment
Jane Adams	1951-52	0	29.3
	1963-64	23.1	73.8
Cornell Heights	1968-69	8.8	44.2
	1969-70	20.5	59.1
Edison	1951-52	0	43.1
	1963-64	23.1	80.0
Irving	1950-51	0	27.3
	1951-52	0	46.6
Jackson Elementary	1950-51	0	26.2
	1951-52	0	35.9
Jefferson Primary	1968-69	39.1	57.1
	1969-70	39.3	72.0
	1972-73	32.3	93.5
Longfellow	1968-69	17.5	42.3
	1969-70	20.0	50.2
Residence Park Primary	1963-64	5.7	80.0
Weaver	1951-52	4.0	67.6
Westwood	1963-64	31.3	94.7
Whittier	1951-52	0	29.9
Roosevelt	1963-64	26.8	94.6

DEFENDANTS' EXHIBIT AJ

Number and Percentage of Racial Composition of Certified Personnel Dayton City School District

	1968-69			1969-70			1970-71			1971-72			1972-73		
	W	B	% Black	W	B	% Black	W	B	% Black	W	B	% Black	W	B	% Black
Administration															
Central Office & Service Bldg.	78	19	19.4	93	32	25.4	100	37	27.0	98.5	43	30.4	99	38.5	28.0
Principals and Asst's	84	27	24.3	82	35	29.9	76	35	31.5	67	39	36.8	72	45	38.5
Total	162	46	22.1	175	67	27.6	176	72	29.0	165.5	82	33.1	171	83.5	32.9
Instructional															
Elementary	1232	534	30.2	1253	567	31.2	1100	583	34.6	1072.1	560.1	34.3	1037.6	582.5	36.0
High	615	212	25.6	597	203	25.4	599	223	27.1	516.0	228.5	30.6	525.5	254.0	32.6
Total	1847	746	28.8	1850	770	29.4	1699	806	32.2	1588.1	788.6	33.2	1563.1	836.5	34.9
Extra Curricular															
Coaches	102	26	20.3	102	28	21.6	109	32	22.7	107	52	32.7	Not Available		
Support Services															
Counselors	63	25	28.4	69	40	36.7	68.5	31	31.2	63.5	36	36.0	59	42	41.5

Compiled by Staff Development Department

DEFENDANTS' EXHIBIT AK

ADMINISTRATIVE STAFF
BY POSITION, RACE, AND SCHOOL YEAR
FOR DAYTON CITY SCHOOLS

	1969-70		1970-71		1971-72	
	White	Black	White	Black	White	Black
Superintendent	1		1		1	
Clerk-Treasurer	1		1		1	
Administrative Assistant		1		1		
Assistant Superintendent	3	1	3	1	3	1
Executive Director	1	1	1	1	3	
Director	5		5		5	1
Associate Director	4	2	4	2	3	2
Supervisor and Assistant Supervisor (Certificated)	20	5	30	4	19	4
Supervisor and Assistant Supervisor (Non-certified)	13	3	11	4	13	3
Coordinator	7	1	4	1	9	3
Program Director and Coordinator (Spec. Asst.)	12	11 (Oriental) 1	11	14	2	16
Resource Teacher	6	5	11	7	17	9
Psychologist	15	1	15	1	14	1
Child Accountant	2		1		1	
Other	1				7.5	3 (Oriental) 1
Supervising Principals or Facilitators	2	1	2	1		
TOTAL Central Office and Service Building	93	32	100	37	98.5	43
Percentages	74.6%	25.4%	73.0%	27.0%	69.6%	30.4%
Principals	51	18	51	18	47	22
Assistant Principals	31	17	25	17	20	17
TOTAL Principals and Assistant Principals	82	35	76	35	67	39
Percentages	70.1%	29.9%	68.5%	31.5%	63.2%	36.8%
TOTAL STAFF	175	67	176	72	165.5	82
Percentages	72.4%	27.6%	71.0%	29.0%	66.9%	33.1%

DEFENDANTS' EXHIBIT AL

Summary of Racial Composition of Staff
by Composition of Student Body
Dayton City Schools

	1968-69	1969-70	1970-71	1971-72	1972-73
White principal with no assistant in schools 50% or more black student population	6	6	6	5	5
Negro principal with no assistant in schools 50% or more white student population	0	2	2	5	5
Integrated administrative staff in schools 50% or more black student population	7	13	11	12	13
Integrated administrative staff in schools 50% or more white student population	4	6	8	14	15
Administrative staff same race as predominant racial composition of student population	52	42	42	33	30

Compiled by: Division of Research
Management Services Department

DEFENDANTS' EXHIBIT AN

NUMBER OF TEACHERS BY RACE AND % OF NEGRO TEACHERS

	Elementary Schools	1968-69 White	1968-69 Negro	1968-69 % Negro	1969-70 White	1969-70 Negro	1969-70 % Negro
1	Jane Addams *	20	6	23.1%	20	7	25.9%
2	Allen	24	1	4.0	24	3	11.1
3	Belle Haven	43	2	4.4	44	6	12.0
4	Belmont Elem.	26	1	3.7	25	2	7.4
5	Brown	44	1	2.2	42	2	4.5
6	Carlson *	4	21	84.0	7	20	74.1
7	Cleveland	44	1	2.2	44	3	6.4
8	Cornell Heights 73 *	31	3	8.8	31	8	20.5
9	Drexel	24	2	7.7	23	8	25.8
10	Eastmont	36	1	2.7	29	4	12.1
11	Edison *	2	16	88.9	10	15	60.0
12	Emerson	39	4	9.3	36	6	14.3
13	Fairport	32	2	5.9	29	4	12.1
14	Fairview Elem.	32	2	5.9	29	3	9.4
15	Fort McKinley	17	1	5.6	18	3	14.3
16	Franklin	36	1	2.7	35	2	5.4
17	Cardendale (72-73 *)	8	3	27.3	12	2	14.3
18	Gettysburg	25	1	3.9	21	4	16.0
19	U. S. Grant	30	2	6.3	28	2	6.7
20	Grace A. Greene *	5	21	80.8	14	17	54.8
21	Hawthorne	12	0	0.0	12	1	7.7
22	Hickorydale	22	0	0.0	22	3	12.0
23	Highview *	15	21	58.3	17	17	50.0
24	Huffman	38	3	7.3	41	3	6.8
25	Irving *	9	26	74.3	9	26	74.3
26	Jackson Elem. *	6	33	84.6	9	32	78.0
27	Jackson Primary *	4	19	82.6	10	12	54.5
28	Jefferson Elem *	36	8	18.2	22	14	38.9
29	Jefferson Primary *	14	9	39.1	17	11	39.3
30	Kemp	28	0	0.0	25	2	7.4
31	Levton	22	0	0.0	22	2	8.3
32	Lincoln	42	1	2.3	38	4	9.5
33	Longfellow	33	7	17.5	36	9	20.0
34	Loos	28	1	3.5	26	4	13.3
35	MacFarlane *	1	48	98.0	7	41	85.4
36	Horace Mann	14	0	0.0	12	2	14.3
37	McGuffey	35	1	2.8	31	6	16.2
38	McNary *	3	19	86.4	8	15	65.2
39	Meadowdale Elem.	30	1	3.2	25	4	13.8
40	Miami Chapel *	4	29	87.9	9	28	75.7
41	Patterson Elem	25	1	3.9	24	1	4.0
42	Residence Park Elem. *	11	23	67.7	18	17	48.6
43	Residence Park Primary *	5	11	68.8	5	10	66.7
44	Ruskin	38	1	2.6	36	2	5.3
45	Shiloh	19	0	0.0	26	1	3.7
46	Shoup Mill	14	1	6.7	12	2	14.3
47	Louise Troy *	0	20	100.0	4	25	86.2
48	Valerie	18	1	5.3	18	5	21.7
49	Van Cleve	33	1	2.9	27	5	15.6
50	Washington	23	4	14.8	21	6	22.2
51	Weaver &	5	43	89.6	11	38	77.6
52	Webster	28	0	0.0	26	3	10.3
53	Westwood *	22	42	65.6	26	34	56.7
54	Whittier *	12	21	63.6	14	17	54.8
55	Wogaman *	1	40	97.6	9	33	78.6
56	Orville Wright	29	1	3.3	28	4	12.5
57	Gorman	14	0	0.0	14	2	12.5
58	Kennedy	17	6	26.1	15	5	25.0
	Total (Elem.)	1,232	534	30.2%	1,253	567	31.2%
	Full-time instructional staff (Elem.)				Full-time instructional staff (Elem.)		

Defendants' Exhibit AN

NUMBER OF TEACHERS BY RACE AND % OF NEGRO TEACHERS

	High Schools	1968-69 White	1968-69 Negro	1968-69 % Negro	1969-70 White	1969-70 Negro	1969-70 % Negro
1	Belmont	82	5	5.8	73	8	9.9
2	Dunbar *	8	62	88.6	12	53	81.5
3	Fairview	72	5	6.5	61	6	9.0
4	Kiser	44	2	4.4	40	3	7.0
5	Meadowdale	75	4	5.1	70	5	6.7
6	Patterson Co-op	82	3	3.5	89	6	6.3
7	Roosevelt *	36	68	65.4	44	64	59.3
8	Roth *	19	50	72.5	25	38	60.3
9	Stivers	50	3	5.7	54	4	6.9
10	Col. White	80	5	5.9	70	11	13.6
11	Wilbur Wright	67	5	7.0	59	5	7.8
	Total (High)	615	212	25.6%	597	203	25.4%
	Full-time instructional staff (H.S.)				Full-time instructional staff (H.S.)		
	Total (Elem. & High)	1847	746	28.8%	1850	770	29.4%
	Full-time instructional staff (Elem. & H.S.)				Full-time instructional staff (Elem. & H.S.)		

* Denotes schools with 75% or more black student enrollment.

Defendants' Exhibit AN

RACIAL COMPOSITION OF SCHOOLS
FOR 1970-71, 1971-72 AND 1972-73

Item.	Schools	1970-71 White	1970-71 Negro	1970-71 % Negro	1971-72 White	1971-72 Negro	1971-72 % Negro	1972-73 White	1972-73 Negro	1972-73 % Negro
1.	*	14	10	41.7	15.8	10.7	40.3	13.9	10	41.8
2.		21	3	12.5	17.1	7	29.0	15.3	9	37.0
3.		35	3	7.9	23.9	12.8	34.8	22.2	13	36.9
4.		18.5	3	14.0	14.3	7	32.8	11.8	8.4	41.6
5.		40	3	7.0	27.8	12	30.1	30.1	11.5	27.6
6.		4	21	84.0	14.8	9.3	38.5	15.7	11	41.1
7.		43	4	8.5	32.5	14	30.1	33.9	12	26.1
8.		24	12	33.3	26	12	31.5	25.5	15	37.0
9.		17	7	29.2	19.7	8	28.8	17.6	6	25.4
10.		28	3	9.7	17.9	7.5	29.5	12.6	7.3	29.3
11.		6	14	70.0	14.5	9	38.2	12.7	12.2	49.0
12.		32	10	23.8	21.2	15	41.4	21	12.5	39.1
13.		28	5	15.2	19.4	12.1	38.4	16.5	9.6	36.8
14.		27	5	15.6	22.1	8.3	27.3	21	9	20.0
15.		14	3	17.6	12.6	5.5	30.3	13.3	5	27.3
16.		30.5	3	9.0	17.5	7	28.5	18.1	9.2	33.7
17.		9	8	47.1	14.6	7.1	32.7	14.4	10.5	42.2
18.		20	4	16.7	15.1	9.4	38.3	14.2	12	45.8
19.		25.5	3	10.5	18.2	7	27.7	19.6	9.2	31.9
20.	*	10	20	66.7	15.4	8.8	36.3	13.3	10.6	44.4
21.		9	2	18.2	8.8	3.4	27.8	7.4	2.6	26.0
22.		14	4	28.6	14.1	6	29.5	13.7	4.6	25.1
23.	*	15	18.5	55.2	19.7	10.8	35.4	15.8	11.6	42.3
24.		39	4	9.3	25.8	12.4	32.4	26.7	14.1	34.5
25.	*	6	23	79.3	16.4	12	42.2	16.2	11.2	40.9
26.	*	10	29	74.4	26	15.4	37.2	20	17.3	46.4
27.	*	8	11	57.9	11	5.6	33.7	11.8	5.4	31.4
28.	*	24	15	38.5	42	22	34.3	23.6	14	37.2
29.	*	14	8	36.4				16.8	8	32.3
30.		22	2	8.3	13.8	9	39.4	16.1	6.5	28.8
31.		21	0	0.0	13.1	7	34.8	11.7	5	29.9
32.		33	6	15.4	23.4	12	33.8	24.3	9.7	28.5
33.		31	10	24.4	31.4	16	33.7	28.4	18	38.8
34.		28	2	6.7	17.2	7	28.9	20.8	7	25.2
35.	*	7	41	85.4	28.	17	37.4	26.3	20	43.2
36.		11	2	15.4	8.8	4.4	33.3	7.7	4.1	34.7
37.		22	8	23.5	22.9	10.5	31.4	20.9	8.5	28.9
38.	*	7	13	65.0	11.8	7	37.2	9.3	7.4	44.3
39.		24	4	14.3	15.4	7	31.2	20.7	5.4	20.7
40.	*	8	27	77.1	see Louise Troy			11	8	42.1
41.		24	0	0.0	17.8	7.8	30.4	32.8	15.6	32.2
42.	*	14	19	57.6	14.1	11.5	45.3	18.2	11.2	38.1
43.	*	7	9	56.3	10.2	5	32.9	12.9	5	27.9
44.		31	5.5	15.1	23	11.2	32.7	22.8	11.2	32.9
45.		22	3	12.0	14.4	8.5	37.1	13.4	12	47.2
46.		10	2	10.7	7.8	3	27.7	5.9	2.2	27.2
47.	*	7	20	74.1	24.7	15	37.7	14.5	8	35.6
48.		15	3	16.7	13.1	4.2	24.2	12.1	4.6	27.5
49.		26	6	18.8	19.3	11	36.3	19	11	36.7
50.		19	9	32.1	15.6	9.6	38.0	17.3	9	34.2
51.	*	10	37	78.7	24.8	15.3	38.1	20.2	14.3	44.4
52.		19	3	13.6	14.4	6.3	30.4	14.9	7.8	34.4
53.	*	22	33	60.0	35.5	22.4	38.6	33.4	23.2	41.0
54.	*	9	20	69.0	26	16	38.0	21.3	14	39.7
55.	*	8	30	78.9	24.5	16.1	39.6	21.8	21.6	49.8
56.		28	1	3.4	29	15	34.0	27.7	17	38.0
57.		11.5	2	14.8	11.8	2	14.4	12.5	2.4	16.1
58.		14	7	33.3	15.7	6.2	28.3	see Patterson elem.		
Total (Elem.)		1100	583	34.6	1072.1	560.1	34.3	1017.6	582.5	36.0

Defendants' Exhibit AN

RACIAL COMPOSITION OF SCHOOLS
FOR 1970-71, 1971-72 AND 1972-73

High Schools	1970-71 White	1970-71 Negro	1970-71 % Negro	1971-72 White	1971-72 Negro	1971-72 % Negro	1971-73 White	1971-73 Negro	1971-73 % Negro
1.	74	10	11.9	63	21	25.0	66.5	20	23.1
2. *	12	59	82.1	33.6	29	46.3	36.5	37	50.3
3.	57	8	12.3	41.6	16	27.7	44.6	19	29.9
4.	39	2	4.9	30	8	21.0	31.8	8	20.1
5.	71	5	6.6	55.6	23	29.2	61.6	19	23.6
6.	92	6	6.1	72.5	23	24.0	72.5	27	27.1
7. *	44	65	59.6	48	32	40.0	41	37	47.4
8. *	21	43	67.2	36	21.5	37.3	35	27	43.5
9.	52	6	10.3	41.2	15	26.6	40.5	18	30.8
10.	79	13	14.1	52	26	33.3	53	25	32.1
11.	58	6	9.4	42.5	14	24.7	42.5	17	28.6
Total (High)	599	223	27.1	516.0	228.5	30.7	525.5	254	32.6
Total (Elem. & High)	1699	816	32.2	1588.1	788.6	33.2	1363.1	836.5	34.9
							2399.60		

* Denotes schools with 75% or more black student enrollment.

DEFENDANTS' EXHIBIT AO

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COUNSELOR ASSIGNMENTS BY RACIAL IDENTITY
September, 1968 - 1973 School Year*

October 12, 1972

	1968-69		1969-70		1970-71		1971-72		1972-73	
*Total Counselors	88		109		99.5		99.5		101	
	No.	%	No.	%	No.	%	No.	%	No.	%
Black	25	28.4	40	36.7	31	31.2	36	36	42	41.5
White	63	71.6	69	63.3	68.5	68.8	63.5	64	59	58.4
Black counselors assigned to predominately black schools	25	100	30.5	76.25	24	77.4	12	33.3	20	47.6
Black counselors assigned to predominately white schools	0	0	9.5	23.75	7	22.6	24	66.6	22	52.3
White counselors assigned to predominately white schools	58	92.1	60	87	37.5	83.9	42.5	66.6	36	61.9
White counselors assigned to predominately black schools	5	7.9	9	13	11	16.1	21	33.3	23	38.9

*These figures apply to counselors assigned to Elementary, Middle and High Schools.

DEFENDANTS' EXHIBIT AP

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DAYTON CITY SCHOOL INTEGRATION STATISTICS

HIGH SCHOOL COACHING STAFFS

NUMBER OF SCHOOLS SEGREGATED 100%		1963-64 9	1964-65 8	1965-66 9	1966-67 9	1967-68 7	1968-69 5	1969-70 5	1970-71 3	1971-72 0
1. Belmont	White	12	11	11	10	10	11	11	11	10
	Black	0	0	0	0	0	0	0	0	2
2. Dunbar	White	0	0	0	0	1	1	1	3	7
	Black	8	10	10	10	10	9	8	9	9
3. Fairview	White	8	8	8	10	9	10	10	12	10
	Black	0	0	0	0	0	0	0	1	5
4. Kiser	White	8	8	8	9	10	10	11	11	10
	Black	0	0	0	0	0	0	0	0	2
5. Meadowdale	White	10	9	11	10	13	11	12	12	13
	Black	0	0	0	0	1	1	1	1	3
6. Patterson	White	5	5	6	7	9	15	14	16	11
	Black	0	0	0	0	0	0	1	1	3
7. Roosevelt	White	10	9	9	10	12	10	7	5	8
	Black	3	3	3	2	3	4	8	9	8
8. Roth	White	9	10	10	10	8	2	7	7	9
	Black	3	4	4	1	5	9	4	8	7
9. Stivers	White	9	10	11	10	10	11	11	12	10
	Black	0	1	0	0	0	1	0	0	4
10. Colonel White	White	9	11	10	11	11	11	11	9	9
	Black	0	0	0	0	0	1	2	2	6
11. Wilbur Wright	White	8	11	10	10	11	10	10	11	10
	Black	0	0	0	0	0	1	1	1	3
GRAND TOTALS	White	88	92	94	97	104	102	102	109	107
	Black	14	18	17	13	19	26	28	32	52
		102	110	111	110	123	128	130	141	159

DEFENDANTS' EXHIBIT AQ

Schoolday | Dayton Public Schools

Number 31 Office of the Superintendent April 21, 1969

State Survey

Dayton Schools' Record Highest In Employment of Negro Educators

Dayton is a city of employment opportunity for Negro educators.

Dayton schools have the top record in employment of Negro teachers among the state's largest cities.

A district-by-district survey ordered by the State Board of Education discloses that Dayton ranks number one in:

- Proportion of Negro teachers to Negro pupils.
- Proportion of Negro administators to Negro pupils.

The report shows that Dayton, with 38.3 per cent Negro student enrollment, has a 28.6 per cent Negro teaching staff–precentagewise a ratio of three to four.

Only Cleveland employs a higher percentage of Negro teachers, but the ratio of Cleveland's percentage of Negro teachers to percentage of Negro students is only two to three–25 per cent compared to 55 per cent respectively.

Dayton also ranks second in the state in the proportion of total teaching staff that is Negro.

The city ranks second again in total per cent of Negro administrators, its 21.6 per cent exceeded only by Cleveland. The latter's percentage of administators to pupils is a ratio of only two to five, however, compared to Dayton's nearly three to five.

Dayton employs three times the percentage of Negro teachers as the average of the 20 largest districts and four times the percentage of administrators, the report shows.

The totals for the 20 cities reveal 9.5 per cent of their teachers and 5.5 per cent of the administrative staffs are Negro, compared to the Dayton figures of 28.6 per cent and 21.6 per cent.

Employment in Large Ohio Cities

City	% Negro enrollment	% Negro teachers	% Negro Administrators
Akron	25.8%	7.6%	13.2%
Canton	19.6%	6.0%	1.3%
Cincinnati	42.9%	22.9%	14.3%
Cleveland	55.9%	37.9%	23.5%
Columbus	26.0%	12.6%	11.3%
DAYTON	38.3%	28.6%	21.6%
Toledo	26.7%	17.0%	12.7%
Youngstown	40.9%	7.5%	12.0%
20-city total	18.9%	9.5%	5.5%

DEFENDANTS' EXHIBIT AR

	SCHOOL & ADDRESS		% OF MINORITY STUDENTS BY YEAR						
			1963	1967	1968	1969	1970	1971	1972
			64	68	69	70	71	72	73
Elementary Schools (32)									
1.	Jane Addams	35 Victory Drive	41.6	67.7	73.8	70.7	80.3	81.7	78.7
2.	Allen	132 Aleska Street	0.8	0.2	0.1	0.1	0.2	0.6	0.6
3.	Belle Haven	4401 Free Pike	0.0	0.3	3.0	5.7	6.8	10.3	17.7
4.	Belmont Elem.	2745 S. Smithville Road	0.0	0.0	0.0	0.0	0.0	0.0	0.4
5.	E. J. Brown	48 W. Fairwood Drive	0.3	0.3	0.6	0.8	1.0	1.0	2.2
6.	F. C. Carlson	807 S. Gettysburg	99.8	99.1	99.0	99.7	99.8	99.3	99.0
7.	Cleveland	1101 Patterson Avenue	0.0	0.0	0.0	0.1	0.3	0.3	0.8
8.	Dravo1	149 Miller Avenue	3.3	6.1	3.7	4.3	5.2	6.3	8.2
9.	Eastmont	1480 Glendale Road	0.0	0.0	0.0	0.0	0.0	0.0	0.7
10.	Edison	228 N. Broadway	80.0	95.9	97.1	98.1	98.8	99.7	99.7
11.	Emerson	501 Hickory Street	0.0	0.0	6.3	13.6	11.8	5.6	8.9
12.	Fairport	1952 Fairport Avenue	0.0	0.0	0.1	4.6	9.7	39.7	59.1
13.	Fairview Elem.	1309 Fairview Avenue	1.0	1.1	1.7	3.7	6.3	7.4	14.4
14.	Ft. McKinley	3725 Evansville Avenue	0.0	0.0	0.0	2.5	9.6	1.6	2.6
15.	Franklin	2617 E. Fifth Street	0.0	0.0	0.0	0.0	0.0	0.0	0.3
16.	Gardendale	1733 N. Gettysburg	7.9	23.6	28.5	43.1	71.9	72.3	78.9
17.	Gettysburg	2201 S. Gettysburg	0.0	0.3	3.2	4.6	9.4	14.5	22.7
18.	Gorman	156 Grant Street	15.6	22.1	21.1	17.9	19.3	11.9	11.8
19.	U. S. Grant	4329 Arcadia Blvd.	0.0	0.1	0.1	0.9	0.6	0.8	0.3
20.	Grace A. Greene	503 Edison Street	89.5	97.6	96.8	97.5	96.7	98.3	98.2
21.	Hawthorne	226 McDaniel Street	0.0	0.0	0.0	0.0	0.0	30.1	28.0
22.	Hickorydale	2101 Hickorydale	0.0	0.0	4.6	19.3	8.2	15.5	32.5
23.	Highview	2101 MacArthur Avenue	82.0	96.4	97.9	98.2	98.1	97.9	98.7
24.	Huffman	190 Huffman Avenue	0.9	0.0	0.0	3.4	3.2	0.1	0.1
25.	Irving	355 Cincinnati Street	96.6	98.5	99.0	100.0	99.7	99.5	99.2
26.	Jackson Elem.	317 Abbey Avenue	98.5	98.6	99.1	99.5	99.5	99.6	99.9
27.	Jackson Prim.	1201 McCall Street	98.2	19.7	98.8	99.2	99.4	99.1	99.7
28.	Jefferson Elem.	1231 W. Euclid Avenue	1.2	30.5	80.1	95.3	73.2	91.3	94.9
29.	Jefferson Prim.	1233 W. Euclid Avenue	1.2	48.8	97.1	72.0	93.3	88.0	93.5
30.	Keep	918 Shadbourne Avenue	0.0	0.0	0.0	0.0	0.0	7.2	7.0
31.	Lawton	4032 Linden Avenue	0.0	0.0	0.0	0.0	0.2	0.4	3.8
32.	Lincoln	401 Nassau Street	0.0	0.0	0.0	0.2	0.3	1.0	0.6
33.	Chas. L. Loos	43 Kempler Avenue	1.9	1.2	4.6	5.0	9.5	6.0	5.8
34.	Horace Mann	715 Krebs Street	0.0	0.5	0.2	7.0	11.1	0.7	3.1
35.	McGuffey	1021 Webster Street	0.0	10.9	14.4	18.7	24.2	32.0	41.6
36.	McKinley Park	2400 Hoover Avenue	*	99.4	99.4	98.8	100.0	100.0	100.0
37.	Meadowdale Elem.	6448 Thompson Drive	0.0	0.0	0.0	12.8	7.7	9.2	12.6
38.	Miami Chapel	1610 Miami Chapel	98.6	99.8	99.7	99.8	99.7	100.0	99.8
39.	Patterson/Kennedy	258 Wyoming Street	0.0	0.1	0.0	0.0	0.0	0.3	4.0
40.	Residence Pk. Elem.	833 Elsmere Road	89.0	97.6	98.8	99.2	99.7	99.7	99.8
41.	Residence Pk. Prim.	6611 Oakridge Drive	80.0	97.5	99.3	99.5	98.9	99.8	100.0
42.	Ruskin	275 McClure Street	0.0	0.0	7.0	4.3	3.7	0.1	0.3
43.	Shiloh	5870 Philadelphia Dr.	2.4	0.1	0.1	6.0	7.4	0.9	8.4
44.	Shoup Mill	430 Shoup Mill Road	0.9	0.3	7.1	13.4	13.9	1.4	1.8
45.	Louise Troy	1665 Richley Avenue	99.8	100.0	100.0	99.7	99.9	99.7	99.1
46.	Valerie	4020 Bradwood Drive	*	0.0	7.5	17.4	20.9	13.5	26.0
47.	Van Cleve	45 W. Helena Street	0.9	1.9	1.1	1.7	2.1	14.9	20.2
48.	Washington	2900 E. First Street	23.3	20.1	19.4	18.6	16.4	14.5	15.3
49.	Weaver	2000 Howell Avenue	98.8	99.9	99.9	100.0	99.9	99.7	99.5
50.	Webster	1115 Keifer Street	0.1	0.0	0.0	0.6	0.4	0.6	1.0
51.	Westwood	3410 Hoover Avenue	96.7	96.9	99.6	99.5	99.6	99.5	99.7
52.	Wogaman	2716 Germantown St.	100.0	99.7	100.0	100.0	99.5	99.8	100.0
Middle Schools (5)									
53.	Carnell Heights	2824 Campus Drive	0.0	34.4	44.2	59.1	69.6	72.3	80.5
54.	Longfellow	245 Salem Avenue	5.8	68.7	42.3	50.2	53.9	60.7	64.1
55.	F. C. MacFarlane	215 S. Summit Street	99.6	99.7	99.9	99.9	99.8	99.5	99.6
56.	Whittier	721 Miami Chapel	95.6	99.4	99.2	99.3	99.0	99.5	99.3
57.	Orville Wright	208 S. Wright Ave.	0.0	0.0	0.0	0.8	0.4	0.7	0.1
High Schools (11)									
58.	Belmont	2323 Mayleview Ave.	0.0	0.1	0.1	0.5	1.2	2.7	5.2
59.	Dunbar	2222 Richley Ave.	92.7	97.9	99.9	99.4	99.8	100.0	100.0
60.	Fairview	2434 Philadelphia Dr.	0.9	3.1	5.2	9.3	12.7	19.1	26.1
61.	Kiser	1401 Lee Street	2.7	0.9	1.8	5.4	6.8	6.4	9.8
62.	Meadowdale	4417 Williamson Dr.	0.0	0.9	1.1	1.4	2.9	5.2	19.6
63.	Patterson Co-op	110 E. First Street	1.8	12.8	14.3	22.2	29.8	31.0	32.9
64.	Roosevelt	2013 W. Third Street	96.5	99.4	100.0	99.8	100.0	99.9	100.0
65.	Roth	4535 Hoover Ave.	93.5	85.7	92.3	96.4	97.8	96.5	95.8
66.	Stivers	1313 E. Fifth Street	2.6	1.6	0.6	3.9	10.8	12.3	14.0
67.	Colonel White	501 Niagara Ave.	1.1	8.4	19.3	28.9	42.1	45.9	56.6
68.	Wilbur Wright	1361 Huffman Ave.	3.3	3.3	3.5	4.2	6.7	5.5	9.2

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DEFENDANTS' EXHIBIT AS

Synopsis of Percent of Minority Students
By School
Elementary

Year	All White	All Black
1963-64	22	1
1967-68	18	1
1968-69	13	2
1969-70	7	3
1970-71	5	1
1971-72	3	2
1972-73	0	3

High Schools

Year	All White	All Black
1963-64	2	0
1967-68	0	0
1968-69	0	1
1969-70	0	0
1970-71	0	1
1971-72	0	1
1972-73	0	2

DEFENDANTS' EXHIBIT AT

Number of Schools
By Student Racial Composition
Dayton City Schools

% Negro Composition	1963-64	1967-68	1968-69	1969-70	1970-71	1971-72	1972-73
90-100%	13	19	20	20	20	21	22
80-89%	4	1		1	2	2	1
70-79%		1	1	2	2	2	2
60-69%			1		1	1	1
50-59%	1	1	1	2	1		2
40-49%	1	2	2	1	1	1	1
30-39%	31.1					4	2
20-29%	1	4	2	2			
10-19%	2	3	4	9	8	10	7
0-9%	43	39	38	32	31	28	25
City Average	31.1	37.4	37.7	39.3	40.6	42.7	44.6

Compiled by:Division of Research
Management Services Department

DEFENDANTS' EXHIBIT AZ

EFFORTS TOWARD INTEGRATION IN DAYTON PUBLIC SCHOOLS

Trends and efforts toward integration of both pupils and staff of Dayton schools are obvious in the establishment of a freedom of enrollment policy, the organization and activities of human relations councils, the holding of desegregation in-service education program as well as workshops and retreats to study current social problems, the design of student exchange programs and the use of gifts to our schools for human relations projects.

Other efforts are evidenced by the many projects of the Office of Equal Educational Opportunity in the Dayton school district; the publications, teaching demonstrations, and other curriculum developments of the Negro History division of the instruction department; and reports of desegregation surveys and research studies made in Dayton public schools.

Efforts Toward Integration Through Student Activities

Lack of communication among students, teachers and administrators has been cited as a major factor in school concerns. Many authorities concur that an exchange of views among these persons would alleviate many of the problems currently facing the secondary schools. Students not only must be given a chance to speak, they must also be given the opportunity to be heard. It has become evident to the Office of Student Relations that students, teachers and administrators should be involved in a continuing dialogue over problems important to the school. If this dialogue takes place, the majority of stress and disruptions need not happen. A frank exchange of ideas with students is often a means of warding off barriers to communication which give rise to forceful dissent. That students clamor for more opportunities to be heard indicates

that the concept of youth becoming deeply involved in student programs is a highly significant direction in which schools should be moving.

The following student activities now initiated in Dayton public schools give our students an opportunity to experience meaningful integrated experiences.

Freedom of Enrollment

The Dayton School Board approved a Freedom of Enrollment Policy, effective September, 1969, to assist in providing quality integrated education for all public school students. The policy provides that within certain limitations any student in the school system is eligible to attend any of its schools. The limitations include requirement that space be available in the requested school, that special courses be attainable only in the requested school and that the student's presence in the school will improve racial balance in that building.

Any two students or numerically equal groups may exchange places if the exchange improves the racial balance. The Freedom of Enrollment Policy extends to Elementary Schools as well as High Schools. There have been 405 students transferred under the Freedom of Enrollment Policy. Tables 4 and 5 present statistics pertaining to this program.

TABLE 4. FREEDOM OF ENROLLMENT REPORT, FIRST SEMESTER, SEPTEMBER 22, 1970

	Non-Minority	Minority	Total
Total Number (Elementary & High School)			
Applications Received	53	282	335
Approvals	28	140	168
Disapprovals	25	142	167
Elementary School			
Approvals	6	*43	49
Disapprovals	2	**16	18
Reasons for Disapprovals			
Racial balance not improved	1	5	6
Lack of classroom space	1	9	10
Lack of transportation	0	2	2
Not in good standing	0	0	0
High School			
Approvals	22	97	119
Disapprovals	23	126	149
Reasons for Disapprovals			
Racial balance not improved	5	52	57
Lack of classroom space	9	59	68
Lack of transportation	0	9	9
Not in good standing	0	4	4
Course attainable at home school	9	2	11

*1 Hindu
**2 Spanish-surnamed Americans

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TABLE 5. ELEMENTARY AND HIGH SCHOOL FREEDOM OF ENROLLMENT APPROVALS BY SCHOOL AND GRADE

Elementary Schools	Grades	Total	Schools	Grades	Total	High Schools	Grades	Total
Brown	7,8	2	Lewton	8	1	Belmont	9-17,10-3, 12-1	21
Cleveland	1,6	2	Meadowdale	6,8	2	Dunbar	10	1
Edison	1	1	Ruskin	5,8	2	Fairview	9-24,10-6, 11-1,12-1	32
Fairport	K,5	2	Valerie	K-2,1-1, 2-1,3-1, 5-1,6-2, 7-2,8-1	11	Kiser	9-2,10-1, 11-4	7
Fairview	K-1,1-1, 6-3,7-2, 8-4	11	Van Cleve	3-1,4-1, 6-1,8-2	5	Meadowdale	9-19,10-7, 11-2,12-2	30
Gettysburg	6-2,7-1	3	Westwood	3-1,8-1	2	Roth	12	1
U.S. Grant	4,6	2				Stivers	9-8,10-1, 11-3	12
Jefferson Pr.	1	1				Col. White	11-2,12-1	3
Jefferson El.	3,6	2				W. Wright	9-8,10-1, 11-3	12

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Student Human Relations Councils

Most programs involving human relations and interactions were organized in the local school buildings. The local school personnel best knows its own students, teachers and parents. The students in these schools may have concerns totally unlike those in any other school in our system, so a local building Human Relations Planning Council initiates programs involving staff with students and students with students. In the more successful programs the Human Relations Councils include the principal as well as other staff members chosen wholly or in part by the students. The local Human Relations Council Faculty Advisor meets with the students regularly during the school hours or evenings.

All City Human Relations Council. Subsequent to organizing some local human relations councils, students recognized that certain concerns of human relations and meaningful interactions appeared to be district wide in nature. That is, all senior high schools may deal with students having certain similar types of concerns. Therefore, the All City Human Relations Council was established with the following purposes:

a. To develop a better understanding and mutual regard of all people.

b. To coordinate the activities of the Human Relations Councils of all the member schools.

c. To develop insights among students which may support the attitudes in behavior patterns that tend to improve human relations in all schools.

Humanities in progress. An organization called Humanities in Progress was initiated to provide a program for a small number of students on a demonstration basis. These students would be able to take back to their individual classes the insights gained both from an unusual seminar content and from the interaction of participants from diverse cultural and

ethnic backgrounds. The Humanities in Progress program was discontinued because of lack of funds.

Retreats

Community workshop. A retreat or workshop was held at the Third Baptist Church. This workshop included representation from the following areas: NAACP, Suicide Prevention Center, Southern Christian Leadership Council, The United Theological Seminary, Living Arts, and the Negro History Department from the Board of Education.

All City Human Relations Council retreat. A weekend retreat at Bergamo Youth Center was planned by the students from the All City Human Relations Council. It was an attempt to help each student develop: (a) respect for the rights and opinions of others; (b) a realization that prejudices often stem from lack of understanding; (c) recognition that there are similarities and differences, but differences do not necessarily denote superiority or inferiority.

Cultural contributions retreat. A retreat was held at the Art Institute which dealt with the cultural contributions by persons of different ethnic and religious backgrounds. A second theme of this workshop concerned changing communities and their effects upon school, real estate brokers and social conditions. Resource aid for this workshop was drawn primarily from the Dayton View Stabilization Program.

Community power structure retreat. Mrs. Velma Strode, Community Relations Office, Washington, D.C., was a resource person to students in a workshop that outlined the power structure of our community and what it means. The purpose of this retreat was to explore constructive methods of involving the community and students in bringing about change within the community and school.

Communications skills workshop. A retreat was held at the University of Dayton's east campus to deal with communications skills. The purpose of this communications skills workshop was to assist students in basic communications skills which may have some application in their own school organizations. Members of the Student Senate Advisory Forum, which was formulated as a clearinghouse for student activities on a city-wide basis, were in attendance.

Glen Helen retreat. A weekend retreat was held at Glen Helen, Yellow Springs, Ohio. The purpose of this retreat was to help students develop some degree of (a) sensitivity to and understanding of each person – his importance to the group and his special talents; (b) ability to put general welfare above individual interests; (c) recognition that rules and standards are necessary for group living; (d) ability to work together to achieve common goals.

Exchange Programs

Student exchanges within and outside the school district have been rather extensive. High school and elementary school student exchanges have shown a constructive potential for future orientation programs. One of the primary purposes of student exchange is to allow students to share in school experiences that may differ from experiences in their own school.

Exchanges to establish new friendships. Students of one west side school visited a school outside our district. They spent the day at the school. Each student was invited to have supper in the home of a host student. All students met at the school that evening and attended a basketball game.

City-wide exchange program. Currently students are planning a city-wide exchange that will include the parochial schools. Twenty-six students will visit each high school. The purpose of this student exchange, which is being organized by the student group STRATE (Students Taking Responsible Action Toward Education), is to promote better understanding among students, teachers and administrators. It will allow

Plaintiffs' Exhibit AZ

students to observe the environment and participate in some of the activities of another school. While doing so they will have opportunity to discuss mutual problems and ideas with students in the other environments. They will discuss for instance, school dress codes, student councils, time schedules and projects being planned by the school.

Special Gifts

A special gift was donated by the McConnaughey Family of Cincinnati to be used for promoting human relations activities in the Dayton School District. Funds have been used in many ways.

NEA conference. Two students used funds to attend the NEA's Human Relations Conference in Washington, D.C. One of the students from the Dayton Public Schools presented a position paper, "Student Involvement in Human Relations," which was endorsed by the conferees.

Consultant services. Consultant aid was provided from the Special Gift Fund for human relations facilitators in planning experimental projects for orienting elementary feeder school students before entering high school.

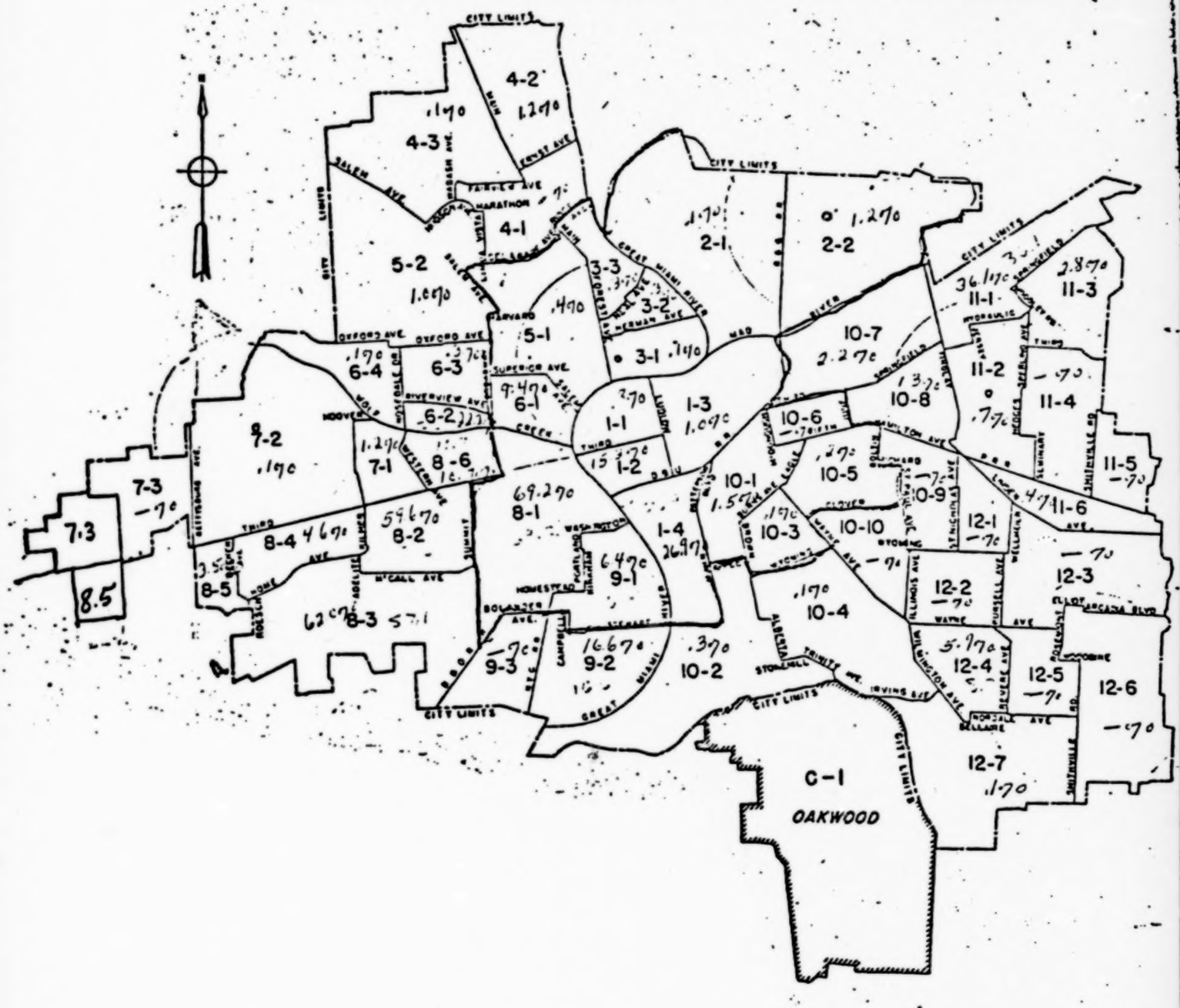
Workshops and conferences. The funds provided a communications workshop for students so that skills might be learned to enhance human relations, and they also paid expenses for a student to attend the Ohio School Board Association Conference in Columbus, Ohio. The funds also provided transportation and other services that would encourage and support human relations activities in various schools.

Unused funds. Any remaining funds will be used to assist in a nominal way any human relations activity within the local district. It has proved beneficial to keep seed money to which will be added possible future gifts.

1940

DEFENDANT'S EXHIBIT NO. BY

DAYTON AND ADJACENT AREA, BY CENSUS TRACTS



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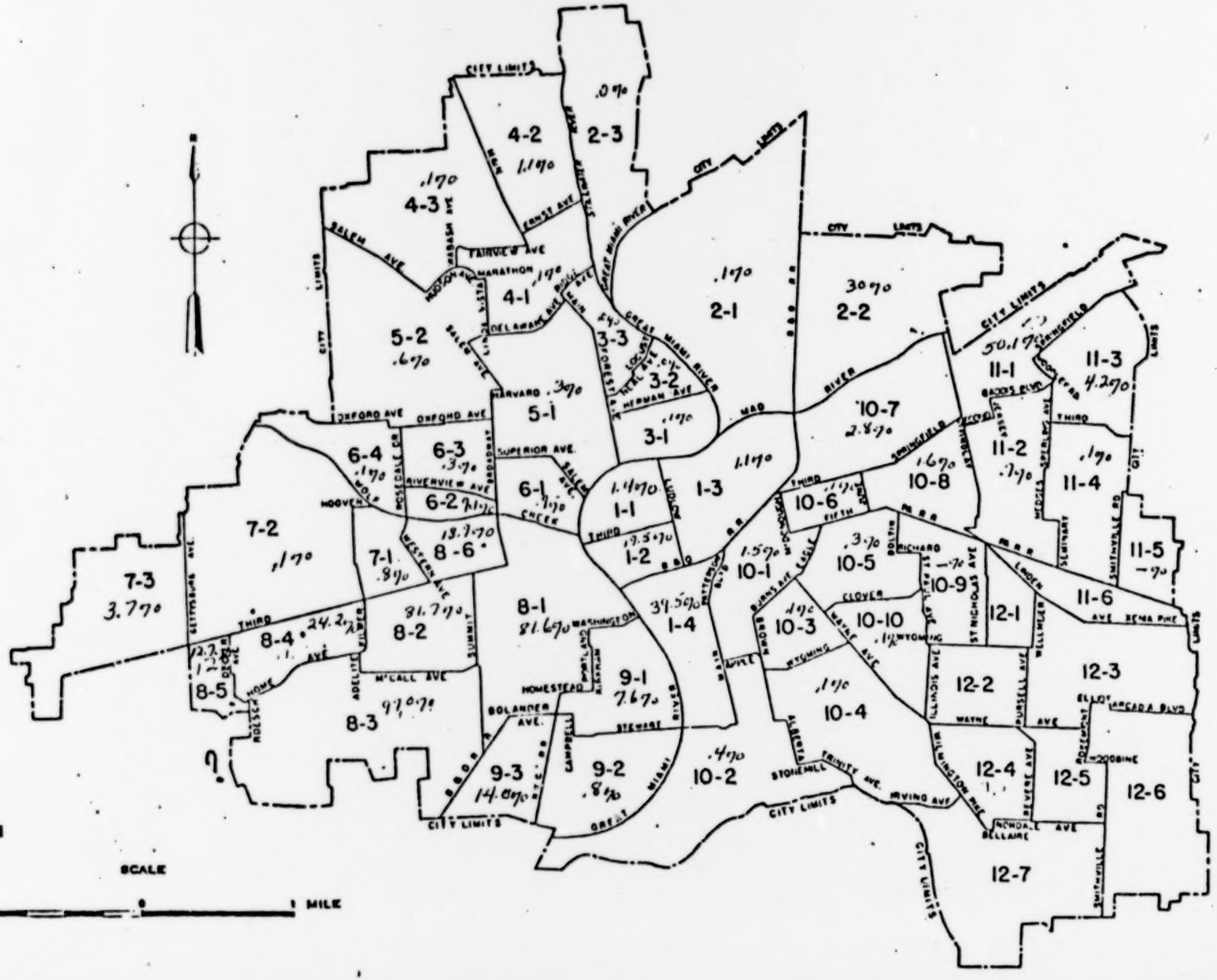
DEFENDANTS' EXHIBIT BY

DAYTON, OHIO, AND ADJACENT AREAS BY CENSUS TRACTS

Part 1.—Tracts in Dayton city 14.0%



Defendants' Exhibit BY

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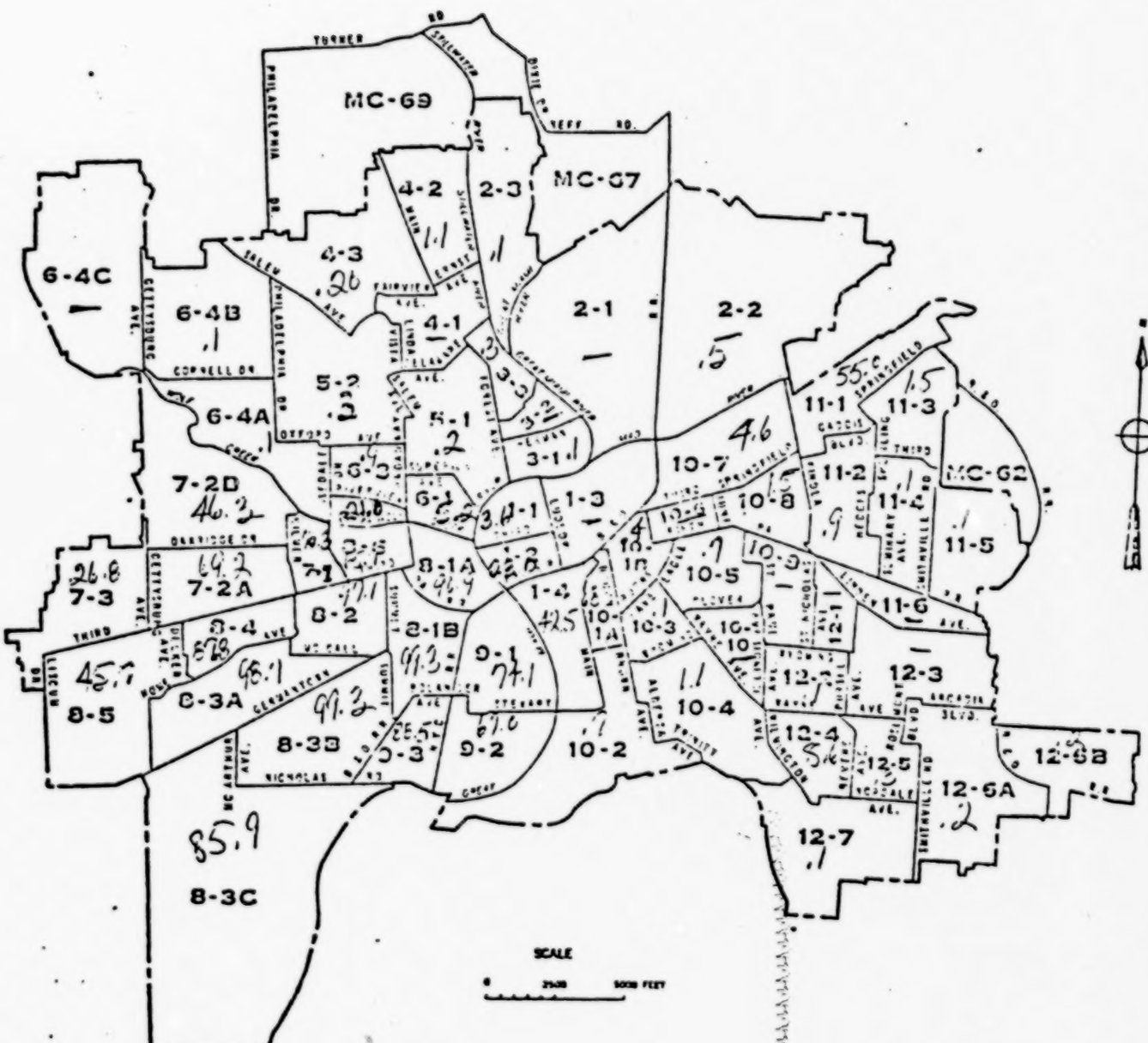
CENSUS TRACTS IN DAYTON, OHIO AND ADJACENT AREA

1960 Census Tracts

DEFENDANT'S EXHIBIT NO. BY



INSET A - DAYTON CITY AND ADJACENT AREA

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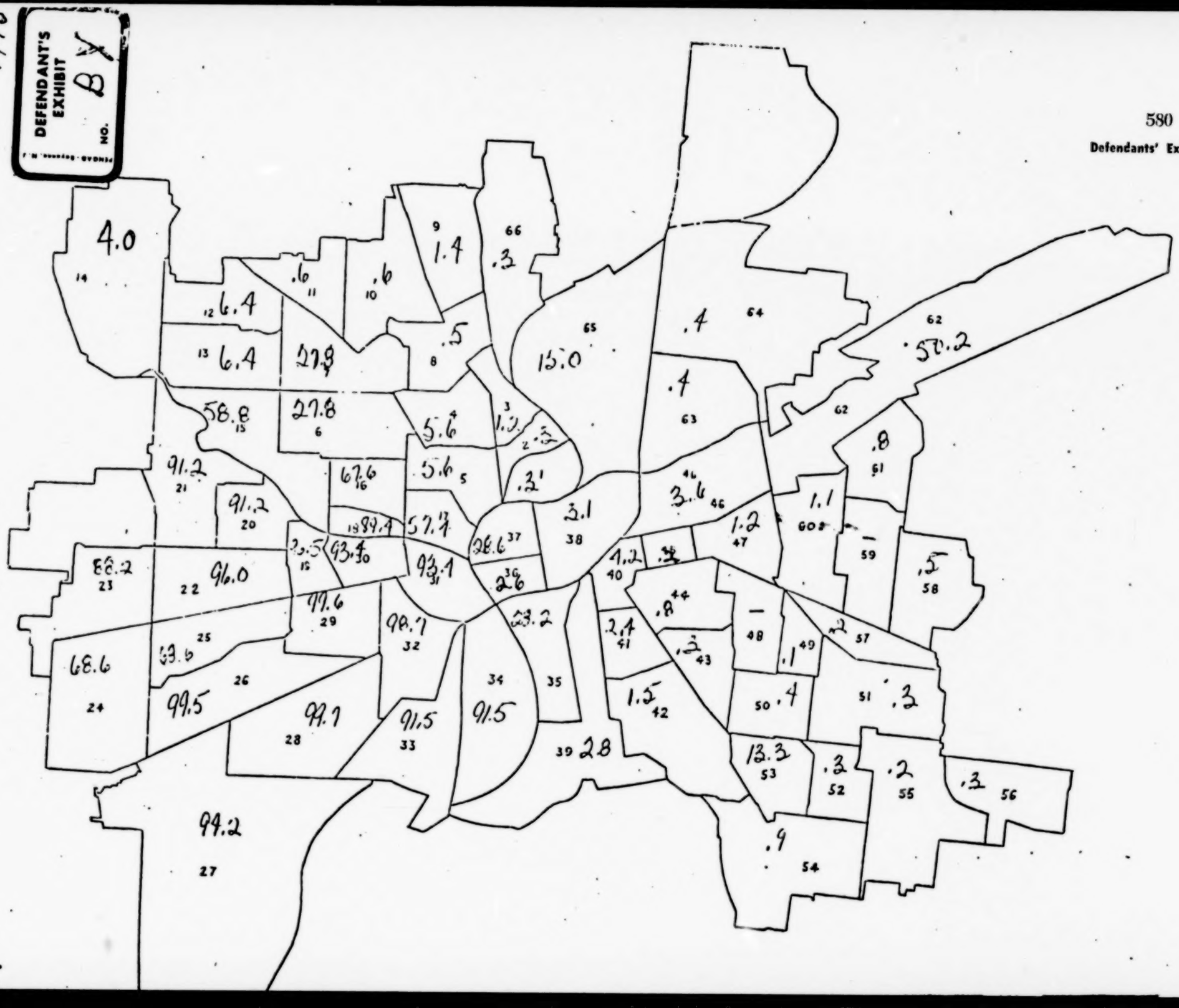
1970

DEFENDANT'S EXHIBIT BY NO.

580

Defendants' Exhibit BY



DEFENDANTS' EXHIBIT CI(2)

ROOSEVELT HIGH SCHOOL

Graduating Class with Number of Students by Race
From the Colonel White-Roosevelt Optional Zone

Years	Total in Graduating Class White	Total in Graduating Class Black	Optional Zone White	Optional Zone Black
1957-58	119	194	5	2
1958-59	103	109	10	0
1959-60	56	271	9	2
1960-61	16	301	2	3
1961-62	19	335	0	4
1962-63	12	292	2	1
1963-64	10	352	1	0
1964-65	5	265	1	2

Supplied by Roosevelt High School
11-9-72

DEFENDANTS' EXHIBIT CM

Racial Composition
Non-Teaching Personnel

	1971-72 BLACK	1971-72 WHITE		1972-73 BLACK	1972-73 WHITE	
Clerical:						
Schools	52	98		52	78	
Others	28	92		45	102	
All	80	190	T270	97	180	T277
Food Service:	82	125		95	150	
Truck Drivers	—	—		2	6	
All	82	125	T207	97	156	T253
Maintenance & Transp.						
Trades	0	30		0	30	
Laborers	2	6		2	6	
Truck Drivers	2	2		2	1	
All	4	38	T42	4	37	T41
Bus Drivers	8	6		7	7	
All	8	6	T14	7	7	T14
Operations						
Schools	143	159		133	162	
Others	4	1		3	2	
All	147	160	T307	136	164	T300
Other						
Stock Clerks	3	8		2	10	
Truck Driver	2	2		2	2	
All	5	10	T15	4	12	T16

Defendants' Exhibit CM

	TOTALS		BLACK		% BLACK	
Clerical						
1971-72	270		80		30%	
1972-73		277		97		35%
Food Service						
1971-72	207		82		40%	
1972-73		253		97		38%
Maintenance & Transp.						
1971-72	42		4		9%	
1972-73		41		4		10%
Bus Drivers						
1971-72	14		8		57%	
1972-73		14		7		50%
Operations						
1971-72	307		147		48%	
1972-73		300		136		45%
Other						
1971-72	15		5		33%	
1972-73		16		4		25%
1971-72	855		326		38%	
1972-73		901		345		38%

Staff Development Dept.
Classified Personnel Div.
Dayton Public Schools
10/27/72

DEFENDANTS' EXHIBIT CN

TRANSFER REQUESTS FOR 1972-73

SCHOOL ASSIGNED	SCHOOL REQUESTED	GRANTED	NOT GRANTED	PLACED ON WAITING LIST	GRANTED IF ROOM	DID NOT KEEP APP
Dunbar	Edison		1			1
	Greo A. Greene		1			1
	Irving		1			
	Jackson					1
	Weaver	1		1		
	Whittier	2	1			
	Wogaman	2			5	
Edison	Dunbar		1			
	Irving					
	Roosevelt		1			
Emerson	Dunbar	1				
Garfield	Central	1	4			
	Dunbar	6	1			
	Edison	8	6			
	Greo A. Greene	4			6	
	Irving	7			3	
	Weaver	14	2		1	
	Willard	4				
	Wogaman	2				
Greo A. Greene	Dunbar	1				
Irving	Roosevelt					

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SCHOOL ASSIGNED		SCHOOL REQUESTED		GRANTED	NOT GRANTED	GRANTED IF ROOM	DID NOT KEEP AP
Whittier	29.9	Jackson	35.9				1
		Willard	100.0	3			
Willard	100.0	Edison	93.0	1			
		Garfield	100.0				1
		Irving	46.6	6	2	3	3
		Jackson	35.9	2			
		Weaver	67.6	6	2	1	
		Whittier	29.9	11		2	1
		Wogaman	100.0	2		1	1
Wogaman	100.0	Any mixed school					1
		Central	33.9		2		
		Dunbar	100.0	2	2		
		Highview	1.7	6	2		7
		Irving	46.6	2	2	5	
		Jackson	35.9	35	6	20	4
		Roosevelt	31.5				1
		Weaver	67.6	14	8	4	4
		Whittier	29.9			1	
		Willard	100.0	3			2
TOTAL				151	53	55	35

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DAYTON PUBLIC SCHOOLS

Veterans Administration Student Attendance at
Residence Park Elementary School 1957-1972

	NAME	YEAR	RACE
1.	Melora Battist	1964	W
2.	Ray Bumgarner	1958-59	W
3.	Judith Brimbury	1965-67	Unknown
4.	James Brimbury	1965-67	"
5.	Thomas Cogbill	1963-66	W
6.	Patricia Davis	1959-61	W
7.	Rebecca Elliott	1958-61	W
8.	Susan Edman	1957-61	W
9.	Lolee Edman	1957-61	W
10.	James Fletcher	1956-57	W
11.	Genevieve Genao	1964-65	W
12.	Angela Genao	1964-65	W
13.	Sean Gabe	1958-59	W
14.	Marguerite Gabe	1958-59	W
15.	George Hill	1962-63	B
16.	Obie Hicks	1958-60	B
17.	William Hicks	1959-60	B
18.	Mary Hicks	1958-60	B
19.	Calvin Hicks	1958-60	B
20.	Michael Ireton	1958-62	W
21.	Kevin Ireton	1961-62	W
22.	Kathleen Ireton	1960-62	W
23.	Margaret Klingenberg	1956	W
24.	Kristen Kinkade	1965-66	Unknown
25.	Caryle Kinkade	1965	Unknown
26.	Roy Kenney	1958-60	B
27.	Debra Kenney	1957-60	B
28.	Cheryl Kenney	1957-60	B
29.	Susan Levin	1962-63	W
30.	Betsy Levin	1962-63	W
31.	Valerie Lefkan	1961-62	W
32.	Richard Lefkan	1957-58	W
33.	Lesley Lefkan	1959	W
34.	Daniel Leary	1960-61	W
35.	Thomas Laneve	1961-62	W
36.	Patricia Laneve	1962-63	W
37.	Mary Laneve	1959-60	W
38.	Joseph Laneve	1960-61	W
39.	Sarah Matre	1958-59	W
40.	Lisa Matre	1959-60	W
41.	Mario Nieto	1962-63	W
42.	Diana Nieto	1962-63	W
43.	Andrea Salerino	1964-66	Unknown
44.	Danny Suttenfield	1959-60	W
45.	Susan Stephens	1962-63	W
46.	Helen Stephens	1958-63	W
47.	Robert Taylor	1958-59	W
48.	Larry Taylor	1958-59	W

The above information from permanent record cards was obtained
from Mr. Raymond Suann, Principal at Residence Park Elementary

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DEFENDANTS' EXHIBIT CP

DAYTON PUBLIC SCHOOLS

Veterans Administration Student Attendance at Jackson Schools 1957-1972

No child living at the Veterans Administration Center is in the records at the schools for 1957-1972.

The above information from permanent record cards was obtained from Mrs. Carrie Mallette and Mr. Richard Bradfield, Principals of the Jackson Complex.

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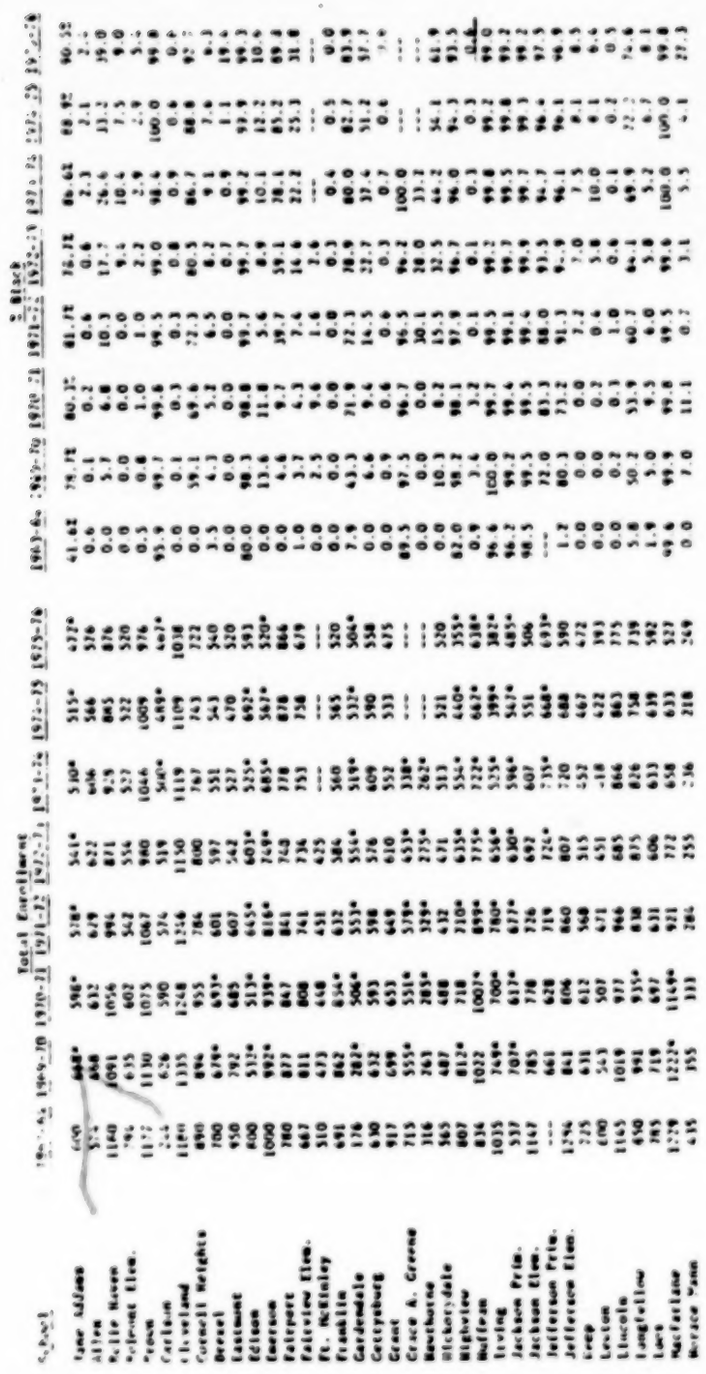

BLACK ENROLLMENT BY SCHOOLS
Dayton Public Schools
October, 1975

School	Total Enrollment 1969-70	1970-71	1971-72	1972-73	1973-74	1974-75	1975-76	1976-77
Case Addams	649	588*	528*	541*	530*	515*	472*	41.62
Allen	552	632	629	622	606	586	516	0.6
Belle Haven	1140	1056	994	871	925	865	836	0.0
Belmont Elem.	794	602	562	554	527	522	520	0.0
Cesar	1177	1075	1067	980	1044	1009	974	0.3
Carlson	224	590	574	519	540*	645*	647*	95.9
Cleveland	1281	1248	1254	1150	1119	1109	1038	0.0
Cornell Heights	890	955	784	800	767	743	722	0.0
Drexel	700	693*	601	597	551	543	540	3.5
Eastmont	950	885	807	542	527	470	520	0.0
Edison	800	532*	445*	603*	525*	592*	520*	80.0
Emerson	1000	934	816*	769*	749	753	778	0.0
Fairport	787	847	841	742	734	753	884	1.0
Fairview Elem.	467	808	741	451	425	---	659	0.0
Ft. McKinley	510	448	434	432	384	---	---	0.0
Franklin	691	834*	553*	554*	560	565	520	7.9
Gardendale	178	506*	598	516	519*	532*	564*	0.0
Georgetown	630	593	598	526	609	580	558	0.0
Grant	917	653	649	610	552	533	475	0.0
Grace A. Greene	715	555*	551*	575*	553*	338*	---	89.5
Hawthorne	316	263	285*	325*	275*	262*	---	0.0
Hickorydale	365	487	488	432	431	513	520	0.0
Highview	807	812*	718	710*	554*	722*	355*	82.0
Huffman	834	1007*	899*	775*	654*	525*	638*	0.9
Irving	1035	7006	780*	654*	596*	597*	382*	96.6
Jackson Prim.	537	615*	673*	630*	692	607	485*	98.2
Jackson Elem.	1167	785	726	719	724*	735*	506	0.4
Jefferson Prim.	---	778	715	807	720	552	693*	---
Jefferson Elem.	1296	661	629	660	515	551	590	1.2
Loop	525	841	804	568	551	-18	472	0.0
Lexton	680	543	503	471	485	844	393	0.0
Lincoln	1165	1015	927	984	838	826	775	5.8
Longfellow	650	991	935*	838	815	833	739	1.9
Lowe	785	719	697	631	606	658	582	99.6
Northridge	1279	1223*	1156*	921	772	633	527	0.0
Norwood Junc	435	355	333	284	255	236	249	0.0

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School	Total Enrollment 1969-70	1970-71	1971-72	1972-73	1973-74	1974-75	1975-76	% Black 1969-70	1970-71	1971-72	1972-73	1973-74	1974-75	1975-76
McGuffey	958	904*	850*	774*	662*	620*	629*	18.9%	24.2%	32.0%	41.6%	47.9%	55.6%	57.8%
McKee	498	456*	423*	409*	412*	410*	360*	98.8	100.0	100.0	100.0	100.0	100.0	99.7
Meadowdale Elem.	671	587	522	508	754	706	691	12.8	7.7	8.2	12.6	12.3	10.6	13.0
Mont Chapel	722	687	481*	410*	398*	380*	500*	99.6	99.7	100.0	99.8	100.0	100.0	98.-
Patterson Elem.**	656	603	621*	619*	726*	659*	586*	563*	0.0	0.0	0.3	4.0	3.8	5.9
Residence Pk. Jrsh.	---	383	464	449	457	411	357	342	---	99.5	98.9	99.8	100.0	99.5	99.-	99.3
Residence Pk. Elem.	1312	766	764	702	660	654	592	536	90.0	99.2	99.7	99.7	99.8	99.5	98.5	98.5
Rushin	1171	927*	870*	834*	756*	733*	741*	716*	0.0	4.3	3.7	0.1	0.5	0.1	0.5	0.-
Shiloh	490	445	619	550	537	548	486	442	2.4	6.0	7.4	0.9	8.4	14.2	15.-	17.-
Stump Hill	318	336	294	207	184	---	---	---	0.9	13.4	13.9	1.4	3.8	---	---	---
Louise Troy	781	724*	691*	592	567	530	504	467	99.8	99.7	99.9	99.7	99.1	100.0	100.0	100.0
Valerie	---	483	450	342	375	452	442	415	---	17.4	20.0	13.5	24.0	30.3	33.3	--.-
Van Cleve	770	780	813*	760*	756*	634*	887*	842*	0.9	1.7	2.1	14.9	20.2	19.6	20.4	22.9
Washington	650	703*	681*	634*	628*	575*	576*	534*	23.0	16.6	16.4	14.5	15.3	15.5	16.5	15.-
Weaver	1260	1118*	1027*	1001*	838*	605*	524*	457*	98.8	100.0	99.9	99.7	99.5	100.0	99.6	99.8
Webster	531	537	486	493	502	527	551	547	0.1	0.6	0.4	0.4	1.0	1.3	3.6	4.8
Westwood	1900	1467*	1409*	1318*	1190*	1008*	955*	877*	94.7	99.5	99.6	99.5	99.7	99.5	99.3	99.5
Whittier	925	801*	688*	748	615	576	533	408	95.6	99.3	99.0	99.5	99.3	99.7	99.1	100.0
Wagaman	1100	1034*	985*	988*	971*	967*	963*	916*	100.0	100.0	99.5	99.8	100.0	100.0	100.0	99.7
Orville Wright	750	758	719	963	929	915	870	781	0.0	0.8	0.4	6.7	8.1	8.2	6.9	8.3
Carmen	102	108	104	101	85	85	86	112*	15.6	17.6	16.3	11.9	11.8	10.6	14.0	14.3
Kennedy**	144	181	169*	153	---	---	---	---	13.8	11.0	12.4	15.7	---	---	---	---
Home Teaching	---	---	---	---	---	---	---	24	---	---	---	---	---	---	---	37.5
Belcont P.S.	1768	2003	1966	2039	2056	2070	2094	2256	0.0	0.5	1.2	2.7	5.2	5.3	6.8	7.6
Dunbar	1180	1471	1333	1369	1357	1012	990	1283	92.7	99.4	99.8	100.0	100.0	99.8	99.8	99.7
Fairview E.S.	1252	1396	1353	1426	1426	1421	1365	1471	0.9	9.3	12.7	19.1	24.1	35.0	43.2	58.3
Elder	740	744	727	731	773	739	688	880	2.7	5.4	4.8	6.4	9.8	16.1	13.5	24.4
Meadowdale H.S.	1154	1750	1783	1828	1866	1986	2145	2033	0.0	1.4	2.9	5.2	10.6	22.7	33.7	40.6
Patterson Bldg.	1020	1659	1756	1764	1737	1236	1297	1371	1.8	22.2	29.8	31.0	32.9	36.9	40.8	48.3
Roosevelt	1850	1703	1727	1691	1539	1393	1148	---	94.5	99.8	100.0	99.9	100.0	100.0	100.0	---
Roth	1120	1291	1143	1191	1183	1068	1071	1204	53.5	94.8	97.8	96.5	95.8	94.3	98.8	99.4
Scivers Bldg.	1150	1074	1224	1247	1216	1217	1184	1268	2.6	3.9	10.8	12.3	14.8	29.7	44.2	60.6
Colonel White	1668	1741	1693	1727	1501	1449	1245	1330	1.1	28.9	42.1	45.9	54.6	60.8	60.7	65.2
Wilbur Wright	1334	1332	1319	1350	1397	1371	1393	1590	3.3	4.2	4.7	5.5	9.2	12.2	12.0	14.9
Totals (Inc. Pre-K)	37,[illegible]	38,287*	36,595*	35,041*	32,182*	29,028*	27,031*	25,181*	31.1	39.3	40.6	42.7	44.6	46.3	47.5	48.9
Totals (exc. Pre-K)					30,798	27,683	25,733	24,165					43.6	45.4	46.5	48.3

* Includes Pre-School in building
** 1972-73, 1973-74, 1974-75, 1975-76 figures listed for Patterson Elem. include both Patterson and Kennedy

Division of Research
Department of Management Services

JOINT EXHIBIT I

Statement to the Board of Education, August, 1968, by Wayne M. Carle, Superintendent of Schools

STEPS TOWARD GOALS OF INTENT

One year ago this month the Board adopted a Statement of Intent for the purpose of restating its past practice and present intentions "in matters having to do with its role in the harmonious development and creative growth of the total community."

The preamble to this statement was as follows:

> "What the best and wisest parent wants for his own child, that must the community want for all its children; therefore, optimum educational opportunities for academic and vocational excellence shall be provided for every child.
>
> "Every reasonable and constructive measure that can be effected will be taken for the ultimate elimination of racial imbalance in our schools.
>
> "Recognizing the need for additional and special educational programs for children and parents from culturally deprived neighborhoods, the Board will be particularly sensitive and willing to experiment in such areas."

The statement then set forth five specific objectives which the Board resolved to implement.

I became aware of this statement last spring and immediately recognized it as a most significant affirmation of a board of education's concern for the major educational problems confronting an increasingly urbanized nation. I know of few boards that had spoken as directly and forthrightly to the challenges confronting it.

By their actions, predecessors of this Board also have been concerned with racial balance. With respect to the West

Side, for example, records indicate the determination, in the early 'fifties, to attempt to reduce the concentration of minority-group pupils in the then three schools with predominantly Negro enrollments — Wogaman, Garfield and Willard — by transferring parts of these districts and integrating other schools. The subsequent large increase in nonwhite enrollments in the surrounding schools, however, finally negated this effort.

When the first Ohio Civil Rights Commission survey was made several years ago, I recall that the Dayton schools were leaders in the employment of Negro teachers in the State. Thus, this is not a community that has been insensitive to the changing needs and demands of the urban center.

On this first anniversary of the Board's statement, I should like to report briefly on some of the many steps that have been taken toward the major purposes to which you pointed twelve months ago. Permit me to relate them directly to the five objectives.

1. The Board of Education will seek to achieve a more nearly balanced racial composition within the areas served by its schools.

- Open enrollment in all Summer high school centers was inaugurated in 1968, extending the various open enrollment plans in elementary and other summer programs.
- Nine receiving schools will be more racially balanced with children from Edison and Jefferson schools, where fire and enrollment growth have necessitated transportation to other classrooms.

2. Selection, recruitment, assignment, or appointment of teachers and administrators will be on merit only.

- Of the 319 teachers employed by mid-August to begin the 1968-69 school year, 29 percent are Negro (27% of the teaching staff was classified as Negro in the 1967 federal survey).

- Among these new teachers, 40 Negro teachers have been assigned to schools with predominantly white enrollments and 64 white teachers are assigned to schools with predominantly Negro enrollments.
- With the opening of the school year, the number of Negro principals will have increased from 10 to 14 since last year and the number of Negro assistant principals will increase from 6 to 15, including schools in the North and East sections of the city which will have Negro administrators for the first time. One-fourth of the administrators of schools are now Negro.
- Internships have been arranged this summer with universities to encourage promising Negroes to qualify for administrative assignments.

3. Curriculum material shall be used which emphasize the creative and positive contributions made by the various ethnic groups which make up the American people.

- In addition to books, records and films in use in the past three years, orders have been placed this summer for 12,648 copies of books on Negro history and biography; 40 sets of multi-media materials; 23 encyclopedias, 280 picture sets and 20 filmstrips representative of recently produced materials in this field.
- The Board has adopted new history textbooks for fifth, eight and eleventh grades that better reflect the contributions of American ethnic minorities.
- A Negro History Committee is working on identification of new materials, informing schools about them, and evaluating their use in the schools.
- Workshops are planned for the coming year to prepare leadership teams from each school to help teachers become acquainted with, and use more effectively, the new materials.

4. The Board shall encourage teachers, administrators, and schools to promote dialogue and creative engagement among the varied ethnic and cultural facets of our system.

- 226 teachers of disadvantaged youth in grades 7 to 12 participated last spring in two programs for the improvement of teaching skills in the Roth, Roosevelt and Dunbar areas.
- Six summer workshops for Dayton teachers emphasized the improvement of skills for teaching in inner-city schools.
- A Learning Disabilities Workshop provided staff members with new insights to meet special needs of children.
- SPEAR, Head Start and Summer School teachers all have attended orientation and succeeding training meetings to improve skills in working with culturally different children.
- The Multiple Motivation Project in Dayton View was funded as a national model for advancing change in education and started last spring as a program to strengthen education and neighborhood stability amid integration.
- Multiple Motivation provided a summer workshop in human relations training for teachers, administrators and community members.
- Follow-up workshops are planned this coming year to train staff leaders to assist schools staffs in problems related to social change.

5. This Board shall actively engage with all governmental, social and community agencies which aim at implementing the policies above.

- In recent months the board has –

  Created a Citizens Advisory Council

  Established continuing liaison with the Assembly of Area Councils

  Met with a committee of the City Commission on city-school cooperation and planned a joint meeting of the full Board and Commission in September.

- During the past year representatives of the schools assisted in developing the proposal for Dayton's Model Cities grant, and a teacher consultant has been working with the Model Cities Planning Council in developing an educational component for the forthcoming plans for this area of the city.

The developments since the Board's statement have indeed been numerous and significant. I have not included the very major developments in services to inner-city schools made possible through the new State funds for Improving the Educational Status of Disadvantaged Pupils, and of the creative way in which the Dayton schools have merged these projects with federally assisted programs. You have had summaries of these programs in recent meetings.

The Board has set forth very high goals for the development of optimum educational opportunities, the reduction of racial isolation, and the provision of programs targeted to the special needs of urban children. They are goals that are worthy of continued effort by every teacher and administrator and of the understanding and support of all citizens.

STATEMENT OF INTENT:

The tenor of our times prompts the Board of Education to restate in simple terms its past practice and present intention in matters having to do with its role in the harmonious development and creative growth of the total community. For the above reasons this statement of intent is issued:

A. What the best and wisest parent wants for his own child, that must the community want for all its chil-

dren; therefore, optimum educational opportunities for academic and vocational excellence shall be provided for every child.

B. Every reasonable and constructive measure that can be effected will be taken for the ultimate elimination of racial imbalance in our schools.

C. Recognizing the need for additional and special educational programs for children and parents from culturally deprived neighborhoods, the Board will be particularly sensitive and willing to experiment in such areas.

THEREFORE, BE IT RESOLVED:

1. The Board of Education will seek to achieve a more nearly balanced racial composition within the areas served by its schools.
2. Selection, recruitment, assignment, or appointment of teachers/administrators will be on merit only.
3. Curriculum material (textbooks, films, teaching aids) shall be used which emphaize the creative and positive contributions made by the various ethnic groups which make up the American People.
4. The Board shall encourage teachers, administrators, and schools to promote dialogue and creative engagement among the varied ethnic and cultural facets of our system.
5. This Board shall actively engage with all governmental, social, and community agencies which aim at implementing the policies stated above.

OPINIONS

6810

1. SCHOOL DISTRICTS–SECTION 3317.14 R.C.–DISTRIBUTION OF STATE FUNDS–DISTRICTS HAVE NOT "CONFORMED WITH THE LAW"–"LAW" EMBRACES ALL RULES AND PRINCIPLES ENFORCED AND SANCTIONED BY GOVERNING POWER–INCLUDES EQUAL PROTECTION PROVISION OF FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHICH FORBIDS SEGREGATION ACCORDING TO RACE.
2. DISTRIBUTION OF STATE AND FEDERAL FUNDS TO PUBLIC SCHOOL DISTRICTS–STATE BOARD OF EDUCATION PRIMARILY RESPONSIBLE FOR ADMINISTERING LAWS RELATING TO–SUBJECT TO APPROVAL OF STATE CONTROLLING BOARD.
3. STATE BOARD OF EDUCATION–PRIMARY DUTY TO DETERMINE WHETHER SCHOOL DISTRICT OR BOARD OF EDUCATION "HAS NOT CONFORMED WITH THE LAW"–SHOULD OBSERVE REQUIREMENTS OF ADMINISTRATIVE PROCEDURE ACT, CHAPTER 119, R.C.
4. FUNDS MAY BE DISTRIBUTED TO SCHOOL DISTRICT WHICH "HAS NOT CONFORMED WITH THE LAW" BY ORDER OF STATE BOARD OF EDUCATION AND STATE CONTROLLING BOARD–ACTING SEPARATELY–FOR "GOOD AND SUFFICIENT REASON" ESTABLISHED TO SATISFACTION OF EACH BOARD.

SYLLABUS:

1. The term "law" as used in Section 3317.14, Revised Code, forbidding the distribution of state funds to school

districts which have not "conformed with the law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.

2. The primary responsibility for administering the laws relating to the distribution of state and Federal funds to the several public school districts is placed with the state board of education, subject to the approval of the state controlling board.

3. It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, "has not conformed with the law" so as to require the withholding of state funds from such district. In making such determination the state board of education should observe the requirements of the Administrative Procedure Act, Chapter 119, Revised Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally.

4. Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds to such district notwithstanding such lack of conformity with the law.

Columbus, Ohio, July 9, 1956

Mr. R. M. Eyman, Executive Secretary, State Board of Education
State Office Building, Columbus, Ohio

Dear Sir:

I have for consideration your request for my opinion in which the following questions are presented:

> "1) Does the term 'the law and the rules and regulations pursuant thereto' in said Section of the Revised Code (Section 3317.14) refer to all the statutes, decisions and constitutional provisions relating to schools, or to the Foundation Law only, or otherwise?
>
> "2) By what procedure may the state board of education and the state controlling board determine whether a local board of education 'has not conformed with the law'?
>
> "3) In determining whether good and sufficient reason for non-conformance has been established to [do] the state board of education and the state controlling board act separately or as a unit?
>
> "4) In making such determination, what, if any, investigative and hearing powers does the state board of education have; what rules of evidence must be followed; and what degree of proof is required?"

As to your first question, a provision is found in existing Section 3317.14, Revised Code, for the withholding of state funds in the case of certain school districts as follows:

> "A school district, the board of education of *which has not conformed with the law* and the rules and regulations pursuant thereto, shall not participate in the distribution of funds authorized by sections 3317.02, 3317.04, and 3317.12 of the Revised Code, except for good and sufficient reason established to the satisfaction of the

superintendent of public instruction and the state controlling board. * * *" (Emphasis added.)

Effective October 1, 1956, an amended provision, analogous to that above, will become effective as follows:

> "A school district, the board of education of which *has not conformed with the law* and the rules and regulations pursuant thereto, shall not participate in the distribution of funds authorized by section 3317.02 of the Revised Code, except for good and sufficient reason established to the satisfaction of the state board of education and the state controlling board. * * *"
>
> (Emphasis added.)

The use of the article "the" in this statute is suggestive, but only faintly so, of the idea that reference is made to a particular legislative enactment. However, it will be seen that there is not the slightest suggestion in the context of this provision which would aid in identifying any such particular enactment.

Moreover, it is to be observed that the article "the" was inserted in the statute in the course of the 1953 codification, the prior analogous provision in Section 4848-6, General Code, reading as follows:

> "A school district, the board of education of which has not conformed with *all the requirements of law* and the rules and regulations pursuant thereto, shall not participate in the distribution of funds authorized by the provisions of sections 4848-1, 4848-3 and 4848-9 of the General Code, except for good and sufficient reason established to the satisfaction of the superintendent of public instruction and the state controlling board; * * *."
>
> (Emphasis added.)

It thus becomes clear, because of the legislative purpose, clearly expressed in Section 1.24, Revised Code, not to effect substantive changes in the recodification process, that the provision here in question, to the extent that the point is pertinent, must be read as though the article "the" had not been inserted as an incident of such recodification.

In Cyclopedic Law Dictionary, Third Edition, on the definition of the term "law" it is said:

> "A distinction is to be observed in the outset between the abstract and the concrete meaning of the word. In the broadest sense which it bears when used in the abstract law, it is the science which treats of the theory of government.
>
> "In a stricter sense, but still in the abstract, it is the aggregate of those rules and principles enforced and sanctioned by the governing power in a community, and according to which it regulates, limits, and protects the conduct of members of the community. In the abstract sense, it includes the decisions of the courts."

In the same work the use of a prefixed article is mentioned as follows:

> "Used without an article prefixed, the abstract sense is generally intended; with an article, the sense is usually concrete."

Applying this rule to the case at hand, and giving consideration to the circumstance that the context in which the term is used in Section 3317.14, Revised Code, gives no hint as to the identity of a particular statute to which reference might be intended, it becomes necessary to conclude that the term "law" as used in that section is used in the abstract meaning of the word.

Because the provision in question relates to the "requirements of law," or conformity therewith, it is clear the term is not here used in such a broad abstract sense as to include

the "science which treats of the theory of government," but rather that it is used in the somewhat stricter sense which embraces "the aggregate of those rules and principles enforced and sanctioned by the governing power in a community" and that it "includes the decisions of courts."

Although not set out in your inquiry in express terms, there is latent therein the question of whether the conformity with law provision in Section 3317.14, Revised Code, is sufficient in scope to include instances of segregation of pupils in school according to race.

In the 14th Amendment of the Constitution of the United States there is this provision:

> "° ° ° No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In Article VI of the Constitution of the United States there is this provision:

> "° ° ° This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. ° ° °"

It is quite clear that these provisions are such as to be comprehended in the term "law" in the sense in which I have indicated such term is used in Section 3317.14, supra, and where there is a denial of "equal protection of the laws" there is an instance of not having "conformed with the requirements of law" or of not having "conformed with the law" as provided in that section.

The equal protection clause above quoted was the subject of

consideration in Brown v. Board of Education, 347 U. S., 483, 98 L. Ed. 873, the headnotes in the latter report of the decision being in part as follows:

> "5. The equal protection clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools, even though the physical facilities and other tangible factors, such as curricula and qualifications and salaries of teachers, may be equal."

In the opinion of the court, delivered by Mr. Chief Justice Warren, there is the following statement:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

This decision is the unanimous pronouncement of the highest court in the land and must be regarded as dispositive of the question of the illegality of racial segregation in the public schools of this state.

It follows, therefore, that in those cases in which your board finds as a matter of fact that racial segregation exists in a particular school district the restrictive provisions of Section 3317.14, Revised Code, must be deemed to apply.

As to the question of your board and the controlling board acting jointly or separately, it is first to be observed that the action of the two boards, in approving distribution of funds notwithstanding a failure to conform with the law, is called for only *after* it is determined that a particular district or board "has not conformed with the law."

Because the state board of education is given the authority and responsibility in Section 3301.07, Revised Code, to "ad-

minister and supervise the allocation and distribution of all state and federal funds," and because, in Section 3317.01, Revised Code, it is provided that "Sections 3317.01 to 3317.15, inclusive, of the Revised Code, *shall be administered by the state board of education,* with the approval of the controlling board," I conclude that the responsibility to ascertain whether in particular cases there is a lack of conformity with law is placed in the first instance with the state board of education.

In this connection, although the controlling board's approval is required in the administration of Sections 3317.01 to 3317.15, Revised Code, it is to be noted that that board's principal function is one in the field of fiscal management and accountability, whereas it is the duty of the state board of education to "administer" the laws relating generally to the operation of the schools, is provided with a departmental staff for the purpose, and is provided with extensive investigative powers as hereinafter pointed out.

Accordingly, until such an initial determination is made, the question of joint or separate action, under Section 3317.14, Revised Code, to distribute funds notwithstanding such failure, is purely academic.

I may observe in passing, however, that I perceive no language in the statute which in any way suggests joint action of such boards, and the fact that each is a separate entity, separately created by law, would clearly indicate the necessity of separate action.

As to the procedure by which your board may reach a determination as to a failure to conform to the law in particular cases, your attention is invited to the following provision in Section 3301.13, Revised Code:

> "• • • In the exercise of any of its functions or powers, including the power to make rules and regulations and to prescribe minimum standards, the department of education and any officer or agency therein, shall be subject to the provisions of chapter 119. of the Revised Code. • • •"

Because one of the functions or powers of the state board of education is to ascertain whether a failure to conform to law has occurred, it is clear that in such a proceeding the provisions of Chapter 119., Revised Code, will apply. Set out in that chapter are detailed procedures for holding hearings, summoning witnesses, receiving evidence, making adjudication orders, and for appeals from such orders by any person "adversely affected."

As to the rules of evidence to be followed and the degree of proof required, your attention is invited to the following provision in Section 119.12, Revised Code:

> "The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by *reliable, probative, and substantial evidence* and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by *reliable, probative, and substantial evidence* and is in accordance with law."
>
> (Emphasis added.)

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. The term "law" as used in Section 3317.14, Revised Code, forbidding the distribution of state funds to school districts which have not "conformed with the law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.

2. The primary responsibility for administering the laws relating to the distribution of state and federal funds to the

several public school districts is placed with the state board of education, subject to the approval of the state controlling board.

3. It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, "has not conformed with the law" so as to require the withholding of state funds from such district. In making such determination the state board of education should observe the requirements of the Administrative Procedure Act, Chapter 119., Revised Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally.

4. Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds to such district notwithstanding such lack of conformity with the law.

Respectfully,

C. William O'Neill
Attorney General

FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-.....

76-539

DAYTON BOARD OF EDUCATION, et al.,

Petitioners,

v.

MARK BRINKMAN, et al.,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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In the

Supreme Court of the United States

October Term, 1976

No. 76-.....

Dayton Board of Education, et al.,

Petitioners,

v.

Mark Brinkman, et al.,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The July 26, 1976, opinion of the Court of Appeals, stay denied August 19, 1976 (Circuit Justice Stewart), is not yet reported. The two prior opinions of the Court of Appeals are reported. 518 F.2d 684 (1975), cert. denied 423 U.S. 1000 (1975); 503 F.2d 684 (1974). The opinions of the District Court are unreported. (These opinions of the courts below appear in the appendix attached to the Dayton Board's Petition for Certiorari and will be cited in this Opposition as App. a.*)

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* Although the record evidence from previous violation and remedial hearings is voluminous, reference to record evidence in this Opposition will be limited to the most recent set of remedial hearings below in December, 1975, and March, 1976, cited as R. — .

Jurisdiction

The Court of Appeals' judgment affirming a plan of desegregation required to eliminate the *de jure* segregated system of schooling previously found (App. 118a-123a) was entered on July 26, 1976. This Court's certiorari jurisdiction is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether any issue warranting this Court's review is presented by the Court of Appeals' affirmance of a plan of desegregation required to eliminate the *de jure* segregation within the Dayton Public Schools consistent with the standards enunciated in *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973) and *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971).

Statement

A. Plaintiffs commenced this school desegregation action in April, 1972, against city and state officials having responsibility for the maintenance and operation of the public schools of Dayton, Ohio. After an evidentiary hearing, the District Court in February, 1973, found a constitutional violation (App. 12a)—on the basis of its findings that there was substantial segregation in the racial composition of Dayton schools; that defendants had utilized optional or dual attendance zones; and that other board action, both historic and recent, also contributed to the segregation.[1]

[1] E.g., the illegal rescission, during the 1971-72 school year, of a system-wide program of desegregation (App. 10a-11a); explicit "physical segregation" of teachers, pupils, facilities and programs among and within schools pre-*Brown* (App. 2a-3a); intentional creation and maintenance of the Dunbar High School as a city-wide, all-black secondary school (App. 4a-5a).

The District Court held "that the totality of these findings require intervention by this Court under the mandate of *Brown* v. *Board of Education*" (App. 12a). Accordingly, the District Court directed the school board to prepare a plan for desegregation consistent with *Swann* and *Davis* (App. 13a-14a, 34a).

After submission of alternative plans and objections by the parties, but without evidentiary hearing, the District Court in July, 1973, adopted the proposal of the Dayton Board majority to eliminate dual zones, to revise transfer priorities, and to provide part-time integration for some students in a few programs; the District Court also required the Board to adopt a "free-choice" plan for all high schools (see, App. 35a-36a). Although expressing disappointment with the limited nature of the Board majority's proposal (App. 27a), the District Court rejected the comprehensive plan of the Board minority.

Plaintiffs (here the Respondents) appealed; and the Dayton Board (here the Petitioners) cross-appealed.

B. On August 20, 1974, the Sixth Circuit affirmed the District Court's ultimate finding that the Dayton schools were unlawfully segregated by race (App. 56a). In addition to the evidence specified by the District Court as part of violation (App. 39a-56a), the Court of Appeals also reviewed defendants' other discriminatory practices promoting and perpetuating racial segregation in the assignment of faculty and staff (App. 56a-61a), in the location and construction of new schools (App. 61a-64a), in the reorganization of grade structures (App. 64a-65a), and in student transfers and transportation (App. 65a-66a).[2] The

[2] For example, the Court of Appeals noted that prior to 1951 faculty and staff were assigned on a racial basis "pursuant to an explicit segregation policy of the Board . . ."; thereafter a new

Court of Appeals concluded that "the remedy ordered by the District Court is inadequate, considering the scope of the cumulative violations" (App. 68a) and remanded the case for further remedial steps consistent with *Swann Keyes* and *Milliken (Id.)*.

Certiorari was not sought.

C. Following remand of the case, the board majority and the plaintiffs each presented separate plans to the District Court. The board majority plan (see App. 91a-92a) was essentially a limited expansion of the prior plan—a modified freedom of choice plan calling for the establishment in some schools of programs not offered in others. These special program schools would be called "magnet schools" and "learning centers." The programs offered were to be designed to attract a limited bi-racial enrollment on a voluntary and, in the main, part-time basis (see App. 91a-92a). In contrast, the plaintiffs' plan used traditional techniques of rezoning, pairing, and grouping of schools. On March 10, 1975, while expressing confusion over the applicable legal standards concerning *de jure* segregation, the District Court provisionally accepted the board majority's plan for the 1975-76 school year (App. 83a-84a). The District Court recognized the very limited nature of the proposals, as well as the school board's failure to consider more promising alternative methods of accomplishing desegregation (App. 80a-81a). The board was directed to study the feasibility of adopting more significant measures for the following school year (App. 81a).

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policy "effectively continued in practice the racial assignment of faculty through the 1970-71 school year" (App. 56a). With respect to school construction, the Court of Appeals noted "that in the period of greatest expansion of the Dayton school system, from the late 1940's to the mid-1960's, the great majority of new schools and additions were located by the Board in either virtually all black or all white areas" (App. 62a).

The plaintiffs immediately appealed, moving for summary reversal and requesting specific remedial directives from the Court of Appeals; for after two years' experience with the Dayton Board's prior special programs and part-time desegregation, the systematic pattern of segregation had remained unchanged. The defendants did not cross-appeal.

D. In its June 24, 1975, opinion, the Court of Appeals [to clear-up the District Court's confusion] again summarized the nature of the violation and the applicable law in this case (App. 89a-90a):

> Segregative acts and practices were found to have occurred both before and after the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and to have continued down to the present time. These findings of fact as to segregative practices in Dayton are set forth in detail in our former opinion. . . . Sufficient to say that . . . these findings of fact . . . are supported by substantial evidence.[3] Although the phrase "de jure" does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation practices. See *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

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[3] The evidence of constitutional violation is more than substantial. For example, the evidence shows that just prior to *Brown* over half of the black students and *all* of the black teachers were isolated in four *all*-black schools as a direct result of the Board's intentionally segregative practices (App. 39a, 50a, 56a) and that, thereafter, staff continued to be assigned on a racial basis (App. 56a), new schools and additions opened almost always on a virtually uniracial basis (App. 62a), racially dual optional zones operated at one time or another to directly affect segregation at over 30 schools (e.g., App. 53a) and the Board deliberately chose in 1971 to perpetuate this pattern of segregation system-wide (App. 55a).

The Court of Appeals noted the inadequacy of the District Court's "remedy." After describing the plan (App. 91a-92a), the Court of Appeals held that the plan failed to remedy the violation of the constitution and failed to obey the previous mandate:

> Under the plan . . . the basic pattern of one-race schools will continue largely unabated. The plan does not even purport to dismantle Dayton's one-race schools . . ., and the vast majority of one-race schools will remain identifiable as such.

(App. 92a-93a). Accordingly, the Court of Appeals remanded the case to the District Court for further proceedings with directions, *inter alia,* "that the District Court adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*" (App. 96a). The Court of Appeals directed that such a plan be adopted by December 31, 1975, for implementation in September 1976.

The Dayton Board petitioned for a writ of certiorari to review this judgment. This Court denied certiorari on December 2, 1975. 423 U.S. 1000.

E. On remand the District Court took action to implement the directions of the Court of Appeals. The District Court immediately appointed an expert, Dr. Charles Glatt, to assist in preparing and evaluating desegregation plans for the Dayton Public Schools. In the midst of his work, Dr. Glatt was murdered. On November 5, 1975, the Court directed the parties to submit proposed plans and appointed Dr. John A. Finger, Jr., as a court expert.

On December 8-9, 1975, the District Court held hearings to consider plans proposed by plaintiffs and friends of

Dr. Glatt, as well as a plan "presented" by a team of Board-appointed experts but neither "proposed" nor "recommended" by the Dayton Board.[4] The plans utilized different techniques to accomplish desegregation. Plaintiffs' plan utilized traditional pairing, clustering and zoning. The Board experts' proposal utilized, within racial desegregation limitations, diverse choice, zoning and curriculum differentiation mechanisms; but the proposal was inchoate in that actual assignments and provision for transportation were not included. R. 38-40, 52, 101, 136-7, 149-151, 188-191, 206-220. The testimony of all witnesses, including plaintiff and Board experts, was in agreement (1) that approximately 15,000 pupils would have to be provided transportation under either proposal; (2) that, because of Dayton's compact nature and thoroughfares, no threat would be presented by the time, distance, and amount of transportation involved in any effective desegregation plan to the health, safety, or education of the school children; and (3) that the proper object of a plan is to eliminate the *de jure* pattern of one-race schools in Dayton. Board Experts' plan at 127; App. 98a; R. 45-46, 71, 130-1, 218, 229-232, 249-252, 255-256.

On December 29, 1975, the District Court issued its order concerning the plans submitted, the December 8 hearings and future proceedings. In light of the two earlier failed

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[4] The Dayton Board expressly rejected approving, proposing, adopting, or recommending its experts' plan or any plan for the District Court's approval. See, App. 121a, where the Court of Appeals later noted, "[t]hough this Court ordered system-wide desegregation on the previous remand, the Board proposed no plan to achieve this mandate." Instead the Board authorized its attorney to present or submit its experts' plan, without Board approval, for the District Court's consideration. See, e.g., App. 116a; R. 203-4. Contrast the affirmative obligation imposed on the Board by *Green* v. *County School Board,* 391 U.S. 430, 438-439 (1968); and compare this continuing three-year pattern of Board conduct with the similar default confronted by the District Court in *Swann.* See, e.g., 402 U.S. at 8-11, 24 n. 8.

plans and after summarizing the different techniques of the two new plans, the very limited nature of federal judicial intervention to protect constitutional rights, and the broad discretion left to the Board on all educational policy and administrative matters, the District Court established a broad racial range (plus or minus 15% of the system-wide racial composition) as a starting point within which the Dayton Board was free to implement the desegregation plan of its choice (App. 103a). The District Court provided for modification of the broad racial guideline in the final plan, including excluding all present 10th through 12th graders and future kindergarten students from the plan and permitting the retention of other one-race or substantially disproportionate schools where shown to be required "by reason of geographic location" (App. 104a).

In its discretion, the District Court also established a priority of remedial devices designed to minimize pupil reassignments and transportation wherever feasible for elementary students (see, App. 119a-120); named Dr. Finger master to work with the defendant school authorities to assist in developing the necessary pupil assignment plan; and approved a representative citizen's board to monitor the plan for a period not to exceed three years (App. 104a-105a).

On March 22 and 23, 1976, the District Court held hearings on March 15 report of the Master concerning a final plan of desegregation for the 1976-77 school year. Working in consultation with the Dayton school administration, the Master reported on the proposed elementary plan which relied primarily on pairing and on a proposed plan for high school which relied on program choices and random assignments within racial guidelines. See, e.g., Report of the Master.[5] The Master estimated that the maximum

[5] From the evidence, it appeared that the Master basically accepted the Dayton school administration's elementary plan except insofar as the school authorities proposed to "phase-in" over a three year period, but opted for a choice mechanism over the Dayton administration's preference for rezoning some schools at the high school level. E.g., Report of the Master; R. 292 et seq.

distance would be somewhat in excess of five miles and that the longest travel time "should not much exceed twenty minutes." *Id.* at 8. See also, R. 391.

At the hearing the Dayton Board presented evidence in support of several modifications: to reassign pupils in advance in the spring by the central administration rather than by the principals in the paired schools on the first day of the 1976-77 school year; to transfer pupils (with no transfer of teachers) between the paired schools on an annual rather than semi-annual basis; to assign high school students on a geographic zone rather than choice and random assignment basis; and to phase-in the elementary plan over three years (including withholding some eight schools from the desegregation plan for the 1976-77 year). E.g. R. 288 et seq. The Board presented *no* argument, testimony, or any other evidence that any school or child should be excluded from the plan because of any geographic location or claim of excessive distance or time involved in reassignment and transportation.

Finally, the Master testified that he did not seek an arbitrary racial balance but rather operated pursuant to the broad and flexible guidelines established by the District Court to disestablish the *de jure* pattern of segregated schools (R. 339, 361-362). Thus, for example, the projected racial composition of high schools varied from 23% to 78% black[6] (R. 361-362; Report of the Master at 21).

[6] This wide variation results from the exclusion of next year's 11th and 12th graders from the plan. Report of the Master at 21. The projected enrollment for the elementary pairings fall within a narrower range under the final Master/Dayton school administration plan (*Id.*, 12-12a). However, these are only projections;

On March 23, 1976, the District Court issued its final order approving the proposed desegregation plan with modifications and directing the Dayton Board to implement that the plan for the 1976-77 school year. With respect to the modifications requested by the Dayton Board, the Court gave the Board the discretion either to implement the Master's report or the Board's proposed modification, except insofar as the Board sought a three-year phase-in (App. 111a). Subject to time constraints and desegregation requirements, the District Court expressed its willingness to consider additional proposals from any party to modify the plan (App. 112a-113a).

On May 11, 1976, the Dayton Board sought six additional modifications which the District Court granted on May 14, 1976, with one exception (concerning the exclusion of eighth graders from the plan)[7] (App. 117a).

The Dayton Board then appealed.

F. In its July 26, 1976, opinion, the Court of Appeals affirmed the judgment of the District Court after carefully reviewing the Board's primary claim that the plan amounted to forbidden "racial balance" (App. 121a). The Court of Appeals first noted that the Board had proposed *no* plan to meet the court's prior mandates of system-wide desegregation and made *no* showing relating to "the topography of the Dayton area, location of natural or artifi-

and no perennial reassignment provision was included, contemplated, or required by the District Court or permitted by the Court of Appeals (see, App. 123a).

[7] The District Court's rationale for excluding, in its discretion, 11th and 12th graders from the plan related to certain unique high school relationships, particularly in extra-curricular activities, already made by these "rising" 11th and 12th grade students. See, App. 101-102. Whatever merit this "rising" student option may have to the high school experience, the District Court was not persuaded of its substance with respect to elementary school children.

cial barriers, geographic isolation or similar [time and distance] considerations" which would require modification of the plan or justify the maintenance of particular one-race schools (App. 121a). "Compare *Goss* v. *Board of Education of Knoxville,* 482 F.2d 1044 (6th Cir. 1973), cert. denied, 414 U.S. 1171 (1974)" (*Id.*). Second, the court approved the District Court's use of a broad and flexible racial range, subject to modification upon proper showing, in initially shaping a plan. Application of the "plus or minus 15%" range in Dayton would permit "black enrollments at particular schools to range between 33% and 63%" even before the board modifications permitted (App. 121a). The court held that this limited use of "mathematical ratios" constituted "no more than 'a useful starting point' in shaping a remedy for past discrimination. *Swann, supra,* 402 U.S. at 25" (App. 119a).[8] Finally, the court noted that the District Court's order applied, by its own terms, only to the 1976-77 school year and did not require any changes thereafter (App. 121a). The court concluded:

> The judgment appealed from in the present case established the first constitutionally sufficient desegregation plan for the Dayton system. If adjustments to this plan are sought by any of the parties in future years, the District Court will necessarily consider the limita-

[8] See also, Statement, pp. 7-9, *supra*. The Dayton Board's offhand suggestion that the Sixth Circuit has been or is bent on "racial balance" (see, Petition 16 n. 2) is an unwarranted attack. For the Sixth Circuit has closely reviewed each case in light of its particular facts and the local circumstances to insure that the substantive teachings of *Swann* have been properly applied in each case. Compare, *Brinkman, supra, with Goss* v. *Bd. of Education of Knoxville, supra; Mapp* v. *Board of Education,* 525 F.2d 169 (6th Cir., 1975); *Kelly* v. *Metropolitan County Bd. of Education,* 463 F.2d 732 (6th Cir., 1972) 508 F.2d 179 (6th Cir., 1974); *Oliver* v. *Michigan State Board of Education,* 508 F.2d 179 (6th Cir., 1974). This Court has denied certiorari from these decisions.

tions in *Spangler* [—— U.S. ——, 44 U.S.L.W. 5114, June 28, 1976] in dealing with such requests.

(App. 121a-122a).

On July 27, 1976, the Dayton Board filed a motion to stay the Judgment with the Court of Appeals, pending writ of certiorari. Pending the Court of Appeals' decision on that motion, the Dayton Board applied to Circuit Justice Stewart for a stay on August 10, 1976. The Court of Appeals denied the stay motion on August 16, 1976; Circuit Justice Stewart denied the application for stay on August 19, 1976. As a result, the desegregation plan has been implemented as required.

The Dayton Board now petitions for a writ of certiorari to review "the first constitutionally sufficient desegregation plan for the Dayton system."

Reasons Why the Writ Should Be Denied

This is a traditional, intra-district, *de jure* school segregation case which raises no new or important issue worthy of review by this Court. As with its previous petition, see 423 U.S. 1000 (1975), denying cert, from 518 F.2d 684 (6th Cir., 1975), the continuing attempt of the Dayton Board to fabricate such an issue is without merit:

1. The Dayton Board's argument that the nature of the violation is anecdotal and that the scope of the remedy must therefore be narrow (see, Pet. 17-19) flies in the face of the findings, conclusions and record below. As noted in the Statement, *supra*, the Dayton Board—in contravention of an 1887 Ohio statute and a 1926 state judicial decision involving the Dayton Board outlawing segregation—engaged in "repeated" acts of blatant, intentional segregation of pupils, teachers, facilities, and extracurricular

activities, including the intentional creation and maintenance of Garfield, Willard, Wogoman, and Dunbar as all-black schools (App. 39a-40a, App. 2a-5a). "Pursuant to an explicit segregation policy of the Board" (App. 56a), Dayton school authorities long assigned *all* black teachers only to all-black classes and schools. As a result, immediately prior to *Brown*, "over half of all black pupils [and *all* black teachers] were enrolled in the four *all* black schools." (App. 50a).[9] Thereafter, this long-standing pattern of segregation by one-race schooling continued without interruption through the time of trial (App. 50a-51a).[10] Cf., *Keyes, supra*, 413 U.S. at 206, 211. Since 1950, racially dual optional zones—which "destroy or dilute the neighborhood school" defense (App. 13a)—directly effected segregation at some thirty schools at one time or another; and there was direct evidence that some optional zones had "racial significance at the time of their creation" and "embraced desires motivated by racial considerations." (App. 51a-52a). Moreover, Dunbar,

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[9] There is no question that this rendered the Dayton school system "dual" in the *Keyes* sense, 413 U.S. at 201, 203, 211-213, at the time of *Brown*. See, e.g., App. 56a ("the basically dual school system inherited at the time of *Brown*").

[10] For example, the Board "effectively continued in practice the racial assignment of faculty through the 1970-71 school year." App. 56a. "The great majority of new schools and additions were located by the Board in either virtually all-black or all-white areas" and opened to virtually one-race student bodies and staff. E.g., App. 62a. There was also evidence that a racially identifiable middle-school reorganization, as well as racially identifiable transfers similarly operated at least to *maintain* this *de jure* pattern of segregation. E.g., App. 65a-66a. Under this Court's decisions in *Keyes* and *Swann*, there is no doubt that these practices, at a minimum, perpetuated the *de jure* system of segregation inherited if not also being independent *de jure* practices themselves. *Keyes*, 413 U.S. at 200-202, 210-213; *Swann*, 402 U.S. at 14, 20-21. In view of the scope of the other independent violations found, the Court of Appeals determined that it was unnecessary to determine whether these practices also violated the constitution. App. 66a-68a.

which "was intended to be and did in fact become a black high school" (App. 4a), remained a district-wide optional zone for "blacks only" through 1962 (App. 5a). By its unlawful rescision in 1972 of a district-wide program of desegregation, the Dayton Board deliberately chose to perpetuate the *de jure* pattern of segregation system-wide (App. 53a-56a; App. 42a-48a). And the Dayton Board presented no evidence showing that the Dayton school system could be divided into "separate, identifiable, and unrelated units," *Keyes*, 413 U.S. at 203, nor that any school or portion of the Dayton Public Schools is geographically isolated (e.g., App. 121a).

In these circumstances, the nature and extent of the constitutional violation are unquestionably substantial and pervasive: *de jure* segregation of the Dayton Public Schools. The court below was manifestly correct in so holding on each appeal (e.g., App. 121a; App. 89a-90a, App. 96a; App. 32a-69a). A system-wide desegregation plan was therefore necessary to remedy the constitutional violation here[11] (App. 96a, 119a). See, e.g., *Swann*, 402 U.S. at 25-30; *Davis* v. *Board of School Commissioners*, 402 U.S. 1, 37 (1972); *Keyes*, 413 U.S. at 214, *Milliken* v. *Bradley*, 418 U.S. at 746, 752 (1974).

[11] For this reason, the decisions and desegregation plan ordered below do not conflict in any way with the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 et seq. As the Court of Appeals held on the prior appeal, "the 1974 Act, read as a whole, does not limit either the nature or scope of the remedy for constitutional violations in the instant case." App. 95a. The 1974 Act provides specifically that "the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. 1702 (b). This Court did not deem this plainly correct judgment of the Court of Appeals worthy of review on the Dayton Board's previous petition for certiorari. 423 U.S. 1000 (1975). Cf., *Drummond* v. *Acree*, 409 U.S. 1228 (1972) (Powell, Circuit Justice).

Thus, with respect to the questions sought to be raised by the Dayton Board concerning the nature of the constitutional violation and the scope of an adequate remedy, the Court of Appeals has adhered scrupulously to the decisions of this Court in *Swann, Keyes, Milliken* and *Spangler* in this traditional, intra-district, *de jure* segregation case. There is no conflict with the decisions of this Court, the Sixth Circuit, or any of the other Court of Appeals. To the contrary, the judgment of the Court of Appeals is manifestly correct.[12] There is *no* reason for granting certiorari to review the judgment below. See, e.g., *United States* v. *School District No. 151*, 432 F.2d 1147 (7th Cir., 1970), cert. denied, 402 U.S. 943 (1971); *Davis* v. *School District*, 443 F.2d 573 (6th Cir.), cert. denied, 404 U.S. 913 (1971); *Kelly* v. *Guinn*, 456 F.2d 100

[12] In an attempt to suggest some conflict or issue worthy of review, the Dayton Board on this petition again refers to the District Court's passing remarks after the first remand for further remedial proceedings, to the effect that the Dayton school system had never been "dual." See, e.g., Pet. 17-18, 26. However, the remarks relate only to the District Court's continuing confusion over semantics. The District Court apparently acted under the impression that the phrases "dual" or "*de jure*" are talismanic and apply only to explicit segregation policies mandated by state law or local ordinance, not to the intentional segregation practices of school authorities. See, e.g., App. 11a-12a; 75a, 77a. On the second appeal, the Court of Appeals responded directly to the District Court's confusion by making explicit what it had held on the first apeal: the pervasive intentional segregation practices by the Dayton Board constitued "*de jure*" (or unlawful) segregation and rendered the system "dual" (or unconstitutionally segregated). App. 89a-90a; see also, Statement, *supra*, at pp. 4-5. In so many words, the Court of Appeals stated that in so-called "Northern" school segregation litigation, substance not semantics must govern the constitutional inquiry—the very message which this Court made clear in *Swann* and *Keyes*. That the Court of Appeals in this case thus properly performed its appellate function with respect to one of its district courts surely presents *no* conflict or issue worthy of review by this Court, particularly from the Court of Appeals' judgment on the third appeal following this Court's denial of certiorari from that holding on the second appeal. See, 423 U.S. 1000 (1975).

(9th Cir., 1972), cert. denied, 413 U.S. 919 (1973); *Cisneros* v. *Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir., 1972), cert. denied, 413 U.S. 920, 922 (1973); *Hart* v. *Community School Board*, 512 F.2d 37 (2nd Cir.), cert. denied, 417 U.S. 943 (1974); *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178 (6th Cir., 1974), cert. denied, 421 U.S. 963 (1975); *Morgan* v. *Kerrigan*, 509 F.2d 58 (1st Cir., 1974), cert. denied, 421 U.S. 963 (1975), 530 F.2d 401, cert. denied, 44 L.W. 3719 (June 10, 1976); *United States* v. *School District of Omaha*, 521 F.2d 530 (8th Cir.), cert. denied, 423 U.S. 946 (1975); and cf., *Milliken* v. *Bradley*, 418 U.S. 717, 738 n. 18 (1974).

2. Contrary to the petitioners' suggestion (Pet. 19-21), the desegregation remedy ordered below does not require "racial balance" as a matter of constitutional right or remedy. To the contrary, as noted by the Court of Appeals, "the use of mathematical ratios in this case [by the District Court constitutes] no more than 'a useful starting point' in shaping a remedy for past discrimination. *Swann*, *supra*, 402 at 25." (App. 122a). Faced by over three years of Board refusal to propose or recommend any plan other than ones which would perpetuate the basically dual system of one-race schooling in Dayton, the District Court looked to the racial composition of the school district as a starting point. The District Court then (a) appointed its expert as master to work with the Dayton school authorities on a broad guideline which would "permit black enrollments at particular schools to range between 33% and 63%" (App. 121a) as a starting point; and (b) established guidelines for elementary students to keep the time and distance of busing to a minimum. App. 102a-104a; 119a-120a. The Board, working with the Master, was then given (a) the discretion to implement any effective plan (e.g., App. 101a-102a, 109a), and (b) the flexibility to di-

verge from the broad range to accommodate legitimate educational concerns and any schools which might be geographically isolated and thus beyond reasonable time and distance limitations. App. 106a, 109a; App. 119a. Cf., *Swann*, 402 U.S. at 24-31.

The Board, to the District Court's satisfaction, showed a need to exempt "rising" high school juniors and seniors from the plan. This resulted in projected enrollments for the 1976-77 school year ranging from 23% to 78% black in high schools under the final plan. However, the Board made no claim and offered no proof showing the geographic isolation of any school or pupil or excessive time or distance of transportation. The Board simply failed to meet its burden to show why other schools or grades should remain one-race or substantially disproportionate. See, *supra*, pp. 6-10. Compare *Swann*, 402 U.S. at 24-31.

Finally, the District Court's judgment, by its own terms, applies only to the 1976-77 school year. And any modifications sought by any party are governed by the decision in *Spangler*, U.S. (June 28, 1976), 44 L.W. 5114. (App. 121a-122a).

In sum, there should be no question that the remedial plan has been ordered by the courts below "to accomplish desegregation of a school system in accordance with *Swann* and not for the purpose of achieving a racial balance." *Drummond* v. *Acree*, 409 U.S. 1228, 1231 (1972) (Powell, Circuit Justice).[13] See also, *Keyes* v. *School District No. 1*,

[13] The District Court's occasional use of the words "balance" or "racial balance," like its use of the word "dual," gives rise to semantic problems. In both instances, the District Court was not using these phrases as they have been defined by recent caselaw and made into almost legal terms of art. Compare Note 12 *supra*. The District Court, however, was fully cognizant of the limitations which *Swann* places on the equitable powers of courts to remedy *de jure* segregation. E.g., App. 103a-104a (quoting *Swann*, 402 U.S. at 24); R. 315. And, as detailed in the text, the District

521 F.2d 465 (10th Cir. 1975), cert. denied, 423 U.S. 1066 (1976) and cases cited in text at Note 12, *supra.*

3. The Procedural issues sought to be raised by the Dayton Board concerning the purported lack of standing and of a class action (Pet. 22-25) are spurious. These issues were resolved adversely to the Dayton Board in the initial decree of the District Court (App. 1a). On its cross-appeal from that ruling, the Dayton Board raised these issues; but the Court of Appeals found the contentions of the Dayton Board "to be without merit." (App. 69a). Having lost its cross-appeal, including on the standing and class action issues, the Dayton Board chose, however, not to petition for a writ of certiorari. The Dayton Board *never* again raised the standing and class action issues before either the District Court or the Court of Appeals through countless proceedings on remand, the two subsequent appeals, and a petition for writ of certiorari. Apparently unwilling to accept the long-standing law of the case, the Dayton Board now seeks to resurrect these procedural issues in its latest certiorari petition.

This procedural claim of the Dayton Board is also without merit. As noted, in their initial decrees in this protracted litigation, the lower courts held "this is a school desegregation suit brought as a class action by the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education." (E.g., App. 1a).

Court did act in fact in accord with *Swann* in the face of the Dayton Board's continuing default. Finally, it should be dispositive that the Court of Appeals scrutinized the record and the District Court's judgments in light of the District Court's loose use of language in order to make sure that substance not semantics would govern his case for remedy just as for violation. Exercising its proper appellate function, the Court of Appeals made sure that the District Court's processes and final orders adhered scrupulously to *Swann, Keyes, Milliken* and *Spangler.* E.g., App. 118a-123a; App. 89a-96a; App. 67a-68a.

Plaintiffs' standing to bring such an action cannot be seriously contested fourteen years after *Brown.* And counsel for plaintiffs are aware of no school case where more Black citizens personally testified so movingly at trial of their direct experiences with the *de jure* practices of their school district and their personal stake in rooting out racial discrimination from their public schools. Contrary to the assertion of the Dayton Board in their petition (Pet. 23-24), it is manifest that the courts below held that the Dayton school system was unconstitutionally segregated and that children were thereby effectively excluded from or assigned to schools on a racially discriminatory basis. See App. *passim.* From the inception of this litigation, and long before, this cause of action has been no idle sport to plaintiffs.

Nor can there be *any* doubt that a school desegregation case is properly maintained as a class action. The Notes of the Advisory Committee on the 1966 Amendments to Rule 23 point to civil rights cases, and school desegregation cases in particular, as the archetype for Rule 23(b)(2). This is so because racial discrimination is by definition class discrimination. E.g., *Hall* v. *Werthan Bag Corp.,* 251 F. Supp. 184, 186 (M.D. Tenn., 1966); *Potts* v. *Flax,* 313 F.2d 284, 289 n.5 (5th Cir. 1963); *Oatis* v. *Crown Zellerbach Corp.,* 398 F.2d 496, 499 (5th Cir. 1968); *Jenkins* v. *United Gas Corp.,* 400 F.2d 28 (5th Cir. 1968). Indeed, an individual parent, child or teacher of the school district is constitutionally entitled to attend a racially non-discriminatory *system* of public schooling. *Brown II,* 349 U.S. 294, 301 (1955). Each has the personal constitutional right "to attend schools which, near or far, are free of governmentally imposed racial distinctions. . . .;" and their school desegregation action is directed at the "*system-wide* policy of racial discrimination." *Potts* v. *Flax,* 313 F.2d 284, 288-290 (5th Cir. 1963).

4. The Dayton Board's last claim is that any desegregation plan for Dayton involving pairing or clustering should be rejected because it will lead to "resegregation" or "white flight." See, Pet. 16, 24-25. There was conflicting argument (and offers of proof) at the December 8-9, 1975, remedial hearings concerning the potential effect of the alternative plans on "white flight" or "resegregation." The Board, without proposing or otherwise supporting any plan, had its attorneys argue that a "choice" plan would be more "stable" than a "pairing" or "rezoning" plan. Plaintiffs countered with evidence showing that such claims of "resegregation" and "white flight" resulting from actual desegregation were factually unsupported. In its evidentiary rulings the District Court indicated its view that any such evidence of opposition to desegregation was not legally cognizable as a reason for limiting or delaying otherwise constitutionally required desegregation (E.g., R. 8-9, 53-54, 129, 282-285, 440-441).

In any event, the December 29, 1975 order and subsequent events rendered the issue moot. The District Court adopted neither plan but rather allowed the Board to adopt either plan, subject to the supervision and report of the court-appointed Master and review by the Court. See Statement, *supra* pp. 7-8. At the subsequent hearing in March 1976, the Dayton Board objected to the Master's "choice" plan for high schools and presented evidence in support of an alternative "pairing" and "rezoning" plan. The Board asked the District Court to substitute the "rezoning" plan for the Master's "choice" plan at the high school level. See, Statement, *supra*, p. 9. The District Court acquiesced in the Board's request for modification by permitting the Board to implement *either* the "pairing-rezoning" or "choice" plan (App. 11a, 115a). In these circumstances, it seems to us that the attempt by the Dayton Board to raise

in the Stay Application "resegregation" or "white flight" claims on this record is totally frivolous if not estopped.[14]

Indeed, the Board's "resegregation" claim, in and of itself, is repugnant to the Constitution. In the Board's petition (at pages 16, 25-26) this Court is "frankly told" that without ultimate rejection of a desegregation plan designed to remedy the constitutional violation "it is apprehended that white students will flee the school system altogether":

> But it should go without saying that the vitality of these principles cannot be allowed to yield simply because of disagreement with them. *Brown* II, at 300.

Monroe v. *Board of Commissioners*, 391 US 450, 459 (1968).

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[14] The reference to the Dayton Board petition at (25) to "testimony of plaintiffs' own witness" to the effect that clustering and pairing would cause "white flight" is wholly misplaced. First, that testimony comes not at all from the December 8-9, 1975, remedial hearings which shaped the final desegregation plans after the second remand; rather, it comes on the first remand from evidentiary hearings in February, 1975, which were naught but a side detour in this protracted litigation. See, Statement, *supra*, pp. 4-5. Second, the testimony is that of a managing agent of an adverse party (the State defendants) who was hostile and whose testimony was never "vouched for" by plaintiffs. Third, plaintiffs introduced substantial direct testimony and made extensive offers of proof at the February, 1975 hearing and again in the December, 1975 remedial hearing to rebut the Dayton Board's "white flight" claim. Fourth, the Board was given discretion to develop and implement any effective desegregation plans; but the courts below would not brook the Dayton Board's attempt to limit its constitutional obligation to eliminate *de jure* segregation by claims of "white flight." (Moreover, the Dayton Board's apparent insinuation, Pet. 25, that pupils have already left the Dayton schools over the past five years as a result of a "forced busing plan" is ludicrous; for there has been virtually *no* effective, full time desegregation in Dayton prior to this fall.) To put the point directly, the Board's presentation of the "white flight" claim to this Court, as to the courts below, is a sham.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Petition for a Writ of Certiorari should be denied forthwith.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-539

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN, and
PHILLIP BRINKMAN,
By Their Mother and Next Friend, Donna
Brinkman, et al.,

Respondents.

(Additional Respondents Inside Cover)

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-539

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN, and
PHILLIP BRINKMAN,
By Their Mother and Next Friend, Donna Brinkman, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF OF PETITIONERS

I. OPINIONS BELOW

The July 26, 1976 opinion of the Court of Appeals for the Sixth Circuit is reported at 539 F.2d 1084. The opinions of the Court of Appeals issued on June 24, 1975 and August 20, 1974 are reported at 518 F.2d 853 and 503 F.2d 684, respectively.

All these decisions and the unreported opinions of the District Court are reproduced in the appendix.

II. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgments of the Court of Appeals for the Sixth Circuit were made and entered on July 26, 1976, June 24, 1975 and August 20, 1974.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fourteenth Amendment To The United States Constitution, Section 1:

". . . nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the law."

B. United States Code, Title 20:

§ 1712. Formulating remedies; applicability:

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek to impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws. 20 U.S.C. § 1712, p. 1685, Supp. V, 1975 (1970 ed.).

§ 1751. Prohibition against assignment or transportation of students to overcome racial imbalance:

No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance. 20 U.S.C. § 1751, p. 1686, Supp. V, 1975 (1970 ed.).

§ 1754. Provisions respecting transportation of pupils to achieve racial balance and judicial power to insure compliance with constitutional standards applicable to the entire United States:

The proviso of section 2000c-6(a) of Title 42 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by section 2000c of Title 42, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth or possession of the United States, regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States. 20 U.S.C. § 1754, p. 1687, Supp. V, 1975 (1970 ed.).

C. United States Code, Title 28:

§ 1343. Civil rights and elective franchise:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails

to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. 28 U.S.C. § 1343, p. 7571 (1970 ed.).

D. United States Code, Title 42:

§ 1981. Equal rights under the law:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. 42 U.S.C. § 1981, p. 10281 (1970 ed.).

§ 1983. Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983, p. 10283 (1970 ed.).

E. Ohio Revised Code, Chapter 33:

§ 3313.48. Free education to be provided; minimum school year:

The Board of Education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof. 33 O.R.C. § 3313.48, p. 175 (1972).

IV. QUESTIONS PRESENTED

A. Does The Imposition Of A District-Wide Racial Balance Remedy Exceed The Remedial And Equitable Powers Of A Federal Court And Does Such Imposition Violate 28 U.S.C. § 1712, Where, Although Isolated Segregative Practices Have Been Found To Exist, It Has Been Affirmatively Determined That The Board Of Education Has At No Time Maintained A Dual System?

B. Is A Judicial Decree Valid Which Requires A Fixed Racial Balance For Each And Every School In The System?

C. Is A Desegregation Remedy That Will Result In Resegregation Constitutionally Mandated?

D. Is A Judicial Decree Valid Where The Complainants Have Failed To Establish That Any Injury To Them Has Occurred Or That The Action is Maintainable As A Class Action?

V. STATEMENT OF THE CASE

The complaint commencing this school desegregation action was filed in the United States District Court for the Southern District of Ohio, Eastern Division, on April 17, 1972 by individuals purporting to act on their own behalf as parents and on behalf of their minor children who attended schools in the Dayton Public School District and by the National Association for the Advancement of Colored People (all of whom are hereinafter referred to as adverse respondents). Named as defendants to the complaint were the Governor of Ohio, the Attorney General of Ohio, the State Board of Education, the Superintendent of the Ohio Department of Education, six individual members of the Dayton Board of Education and the Superintendent of the Dayton School District.

A trial on the single issue of whether the school system of Dayton was a segregated one by reason of acts of the Dayton Board of Education commenced on November 13, 1972. Equity jurisdiction of the District Court was predicated upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and upon 28 U.S.C. § 1343 and 42 U.S.C. §§ 1981 and 1983 (A. 1).

None of the adverse respondents testified at the trial and none of the evidentiary exhibits established that any of the named adverse respondents was ever excluded from attending any school in the Dayton system or that any was a member of a class that was allegedly excluded. Likewise, there was no evidence that any of the adverse respondents was a school child or a parent of a school child or that any of them ever attended or sought to attend a school within the Dayton district.

On February 7, 1973 the Trial Court rendered an opinion in which it found that racially imbalanced schools, optional attendance zones and recent Board action in rescinding three resolutions calling for racial and economic balance in each school in the Dayton system constituted a cumulative violation of the Equal Protection Clause, and that the rescission action

constituted an independent constitutional violation (A. 11, 12). While school practices in the area of staff assignment, establishment of attendance zones, school construction and site selection, grade structure and organization, student transfers and transportation were alleged to have constituted the establishment of a dual system, these practices were passed upon by the District Judge and were found free from any segregative intent or effect (A. 5-10).

In order to correct the constitutional violations, the District Court ordered the Dayton Board to submit a plan which would (1) abolish all optional zones, (2) restate the priorities of the Freedom of Enrollment Program so that racial transfers would take precedence over curriculum transfers, (3) maintain the faculty assignment practices so that the faculty in each school would continue to reflect the approximate racial balance of the total black-to-white faculty in the Dayton system, and (4) establish hiring practices which would enable the clerical and maintenance personnel hired by the Dayton system to approximate the proportion of the black-to-white population within the Dayton system (A. 13).

In compliance with the February 7, 1973 order of the District Court, the Dayton Board submitted its plan to the Court. This plan contained eleven points:

(1) Elimination of all elementary and high school optional areas (A. 131);

(2) Revision of the Freedom of Enrollment Program whereby racial balance took priority over other permissible transfers (A. 133);

(3) Declaration that faculty assignment to each school would continue to reflect a racial composition that would approximate a ratio of black-to-white faculty in the entire district (A. 135);

(4) Modification of hiring practices for classified personnel (A. 136);

(5) Establishment of four city-wide elementary science centers the enrollment of which would approximate the existing black-white ratio of students in the system (A. 137);

(6) Combination of two high schools into a unified co-operative school with district-wide attendance areas (A. 139);

(7) Formation of elementary and high school all-city bands, orchestras and choruses (A. 140);

(8) Provisions for scheduling of integrated athletics (A. 140);

(9) Establishment of a minority language program for education of staff (A. 141);

(10) Utilization of the Living Arts Center for inter-racial experiences in art, creative writing, dance and drama (A. 141);

(11) Creation of centers for rumor control, school guidance and area learning (A. 142).

After submission of the Board plan and after publication of *Keys* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189 (1973), the District Judge entered a supplemental order on remedy (A. 26-31). In this July 13, 1973 opinion the Trial Court stated that there was no "evidence of a failure of the equality of facilities, instructors and curricula opportunities . . . ." (A. 30). The Trial Court adopted the Board plan with the modification that any student could attend any high school of his or her choice within the Dayton system.

An appeal from the constitutional violations and remedy judgment of the District Court was filed by the adverse respondents and the Dayton Board cross-appealed. On August 20, 1974, the United States Court of Appeals for the Sixth Circuit affirmed the finding of three cumulative constitutional violations. *Brinkman* v. *Gilligan,* 503 F.2d 684, 697 (6th Cir. 1974) (A. 56).

The Court of Appeals did not, however, pass upon the question of whether the rescission action constituted an independent constitutional violation. Rather, the appellate court stated that "[t]he question of whether a rescission of previous Board action is in and of itself a violation of the appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took." Continuing, the Court of Appeals held that "[i]f the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board is under such a duty, then the rescission becomes part of the cumulative violation, and it is not necessary to ascertain whether the recission ipso facto is an independent violation of the Constitution." *Id.* at 697 (A. 55).

On the remedy issue raised in the appeal, the Sixth Circuit concluded that the remedy prescribed by the District Court was inadequate. Accordingly, the action was remanded to the Trial Court for formulation of another desegregation plan consistent with the remedial guidelines of *Keyes* and *Swann.* *Id.* at 704 (A. 68).

After the first appellate remand the District Court ordered the Board and any other interested party to submit desegregation plans. Under the plan submitted by the adverse respondents each and every school in the Dayton system would have become racially balanced; that is, the black-white student ratio in each school would approximate within a plus or minus fifteen percent the black-white ratio of the entire district (A. 77-78). The plan submitted by the Dayton Board contained the following key elements:

(1) The closing of the all black Roosevelt High School with the students who would have attended this school being given priority under open enrollment to attend any high school (A. 145);

(2) Creation of a downtown magnet high school and satellite magnets at the predominantly black schools of Dunbar and

Roth with enrollments in the specialized courses offered at these magnets open to students throughout the district (A. 145);

(3) Creation of magnet learning centers for foreign languages, business education and career motivation for sixth through eighth grade students (A. 147-149);

(4) Establishment of a new vocational high school where student enrollment would be racially balanced (A. 146);

(5) Expansion of the science learning centers to accommodate additional middle school students (A. 149);

(6) Establishment of a structured, alternative elementary school at the predominantly black Miami Chapel School where enrollment would reflect the approximate racial balance of the system for those students who attended this elective full time school (A. 146, *see* A. 92).

After a hearing on these plans, the District Court rejected the plan of the adverse respondents; found that racial balance in each and every school was not required under *Swann;* and concluded that the racial balance plan of the adverse respondents was violative of the Equal Educational Opportunities Act of 1974 (A. 79). In provisionally accepting the plan of the Dayton Board for the 1975-76 school year, the Trial Court held that the plan of the Board was desegregative in intent and integrative in effect (A. 80, 83).

In this order of March 10, 1975 the District Judge additionally held that (1) the State of Ohio has not since 1887 mandated a dual system (A. 75); (2) although the Dayton Board has engaged in activities that were segregative in effect and which impinged upon the constitutional rights of the plaintiffs, the Board did not at any time maintain a dual system of education (A. 75, 77); and (3) there were no district-wide segregative acts (A. 77).

The March 10, 1975 order accepting the Board plan was again appealed by the adverse respondents to the Sixth

Circuit Court of Appeals. A motion of the adverse respondents for summary reversal was deferred pending a stepped-up time for submission of briefs and oral arguments. While declining to grant summary reversal because of the time factor between the rendition of the opinion and the opening of school in the fall of 1975, the Court of Appeals remanded the action to the District Court with the direction that "the Court adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this Court and with the decisions of the Supreme Court in *Keyes* and *Swann.*" *Brinkman* v. *Gilligan*, 518 F.2d 853, 857 (6th Cir.) (A. 96), *cert. denied*, 423 U.S. 1000 (1975).

In this second appellate opinion rendered on June 24, 1975 the Court of Appeals held that the Board plan was inadequate since "the basic pattern of one-race schools would continue largely unabated" and "the vast majority of one-race schools will remain identifiable as such." *Id.* at 856 (A. 93). Additionally, the Court of Appeals held that the Equal Educational Opportunities Act of 1974 did not limit the scope of the remedy for the constitutional violations found to exist. *Id.* at 856 (A. 95).

After the second remand order the Trial Court appointed Dr. Charles Glatt as an expert witness for the purpose of preparing a desegregation plan. Due to the unfortunate death of Dr. Glatt the District Court on November 5, 1976 appointed Dr. John A. Finger, Jr. as a court consultant and ordered the Dayton Board and other interested parties to submit desegregation plans on or before December 1, 1975.

During this same time a petition for a writ of certiorari was filed with this Court. The adverse respondents objected to the entertainment of the writ on the grounds that the appellate order of June 24, 1975 was interlocutory and was a remand order requiring further substantive proceedings. See, *e.g., Brotherhood of Locomotive Firemen and Engineermen* v. *Bangor and Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916).

Thereafter the writ was denied. *Dayton Board of Education* v. *Brinkman*, 423 U.S. 1000 (1975).

On December 8, 1975 hearings were held upon the plan submitted by the adverse respondents and the plan transmitted to the Court by the defendant Board. After considering these plans the Trial Court on December 29, 1975 decreed that the Dayton Board could adopt any plan provided that as of September 1, 1976 each school in the Dayton system was desegregated. Desegregated was defined so as to require each school in the system (excepting grades eleven and twelve for the academic years of 1976 through 1978) to have a pupil population that reflected, within a plus or minus fifteen percent, the racial composition of the district as a whole (A. 103). Dr. Finger was appointed as a Master to supervise these student assignments and was directed to submit an assignment report (A. 104-105).

The Master filed his report on March 15, 1976, and a hearing was held on this report on the 22nd and 23rd of March. At the conclusion of the hearing the Trial Court adopted the Master's racial balance assignment plan for the elementary level and rejected the phase-in proposal of the defendant Dayton Board (A. 110-111). At the high school level the Court permitted the Board to choose between the Master's student selection plus random assignment or the Board's proposal for specific attendance districts with the proviso that the racial balance requirement be met (A. 111).

On May 14, 1976 the District Court granted a modification of the Master's report which did not affect the racial balance requirement. At the same time the Court rejected a request seeking permission to exclude most of next year's eighth graders from the racial assignment requirement (A. 117).

An appeal from the judgments of December 29, 1975 and March 25, 1976 was prosecuted by the Dayton Board. The request of the Board for a stay pending appeal was denied, but the entire appellate timetable was stepped-up. On July

26, 1976 the Sixth Circuit affirmed the judgment of the Trial Court which ordered a district-wide racial balance distribution of students in each school in the Dayton system. *Brinkman* v. *Gilligan*, 539 F.2d 1084 (6th Cir. 1976) (A. 118).

The Dayton Board's petition for a writ of certiorari, filed on October 18, 1976, was granted by this Court on January 17, 1977.

VI. SUMMARY OF ARGUMENT

This case raises questions of the definition and limitations of a federal court's equitable powers in fashioning school desegregation remedies. The Dayton Board contends that fundamental legal and constitutional principles have been ignored and distorted by the decisions of the District Court and the Sixth Circuit.

First, the scope of the remedy in a school desegregation case must be determined by the nature of the violation. The lower courts, while finding only limited constitutional violations which did not affect a substantial portion of the Dayton district, have imposed a sweeping decree affecting every school and student in the system. In doing so, they have abandoned a fundamental remedial principle and replaced it with a "mine field" approach under which a school board by committing an isolated segregative act or series of acts triggers off a system-wide remedy.

Second, the fashioning of a desegregation remedy should be guided by the fixed purpose of eliminating state-imposed exclusion of individuals from schools on account of race. By adopting the false assumption that schools cannot be desegregated unless the racial composition of the student body in each school substantially reflects the racial composition in the system as a whole, the lower courts have abandoned this purpose and replaced it with a purpose of securing system-wide racial balance. In doing so they have erroneously constructed a substantive "constitutional" right to a particular degree of racial balance. No such right exists.

Third, the ultimate test of a desegregation remedy is its pragmatic effectiveness in achieving desegregation. The lower courts abandoned this test and replaced it with an artificial mathematical formula test. In doing so they ignored evidence that the result of a system-wide racial balance plan in Dayton would be the conversion of a constitutional promise of equal educational opportunity into the ashes of an impoverished school system serving a low economic, predominantly black student population.

Finally, the lower courts ignored the threshold principle that judicial intervention is not permissible in the absence of a showing of injury to the complainants or some class which they legitimately represent. The jurisdiction which the lower courts exercised in fashioning the inappropriate decrees that have been imposed was never invoked by a party who had standing to bring this action.

VII. ARGUMENT

A. IN A SCHOOL DESEGREGATION CASE THE IMPOSITION OF A DISTRICT-WIDE RACIAL BALANCE REMEDY EXCEEDS THE REMEDIAL AND EQUITABLE POWERS OF A FEDERAL COURT AND VIOLATES 28 U.S.C. § 1712 WHERE, ALTHOUGH ISOLATED SEGREGATIVE PRACTICES HAVE BEEN FOUND TO EXIST, IT HAS BEEN AFFIRMATIVELY DETERMINED THAT THE BOARD OF EDUCATION HAS AT NO TIME MAINTAINED A DUAL SYSTEM.

This case poses basic questions of the limitations of the power of federal courts in fashioning remedies in desegregation cases. The principles from which those questions must be resolved have been enunciated by this Court on repeated occasions. They have unfortunately been ignored with the mildest of lip service in numerous lower court decisions.

In fashioning desegregation decrees, equitable principles control. *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955).

> "[T]he task is to correct by a balancing of the individual and collective interests, 'the condition that offends the Constitution'. A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy.'"

Milliken v. *Bradley*, 418 U.S. 717, 738 (1974), quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). Before any affirmative duty arises to dismantle and to eliminate the identifiability of one-race schools, there must be a finding of a dual system mandated by state statute or a dual system predicated upon evidence establishing state-imposed segregation in a substantial portion of the school district. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 200, 203, 208-209 (1973).

The Sixth Circuit has replaced these standards with a "mine field" theory of fashioning remedies in desegregation cases. Rather than shaping the scope of the remedy to fit the nature of the violation, it has been led by an erroneous definition of desegregation to the false position that the only effective remedy for a system tainted by an act of segregation is an overall remedy. Whenever a school board permits an isolated segregative act or series of acts, it triggers off a system-wide remedy of eliminating racial identifiability by balancing the races in each school in the system.

The relationship between the District Court and the Sixth Circuit in the course of this litigation dramatically reflects the opposition between the "nature of the violation" and the "mine field" theories of fashioning desegregation remedies. The District Court, after a three week trial, found in favor of the School Board on most of the contentions presented by the plaintiffs (A. 1-14). It found against the School Board in three specific and interrelated areas (A. 12) and set forth a

series of minimum requirements to eradicate the effects of the unconstitutional actions that were found to have occurred (A. 13). A plan incorporating those requirements and offering additional integrative proposals was adopted (A. 131-144).

The Sixth Circuit affirmed the factual findings, but looked at the remedy and in essence said "more". *Brinkman* v. *Gilligan*, 503 F.2d 684, 704-05 (6th Cir. 1974) (A. 69). The District Court broadened the remedy, but the Sixth Circuit – while again affirming the factual findings of the lower court – again said "more" with respect to the remedy. *Brinkman* v. *Gilligan*, 518 F.2d 853, 855 (6th Cir.) (A. 93), *cert. denied*, 423 U.S. 1000 (1975). After two reversals the District Court in frustration acknowledged the Sixth Circuit's view that the limited acts of the Dayton School Board had triggered a system-wide mine field (A. 100). Accordingly, it adopted a plus or minus fifteen percent racial balance plan (A. 103) which in turn was approved by the Sixth Circuit. *Brinkman* v. *Gilligan*, 539 F.2d 1084 (6th Cir. 1976) (A. 118).

To gauge and correct the error committed in this case it is necessary to analyze the factual findings that have been made and place them in the context of the applicable law.

1. The Limited Nature Of The Violation In This Case Was Carefully And Narrowly Defined By The Finder Of The Facts.

The arch on which the ruling against the Dayton School Board rests is composed of three findings.

> "The District Court found three constitutional violations in the Dayton school system, namely, (A) racially imbalanced schools, (B) optional attendance zones, and (C) the Dayton Board's rescission of three resolutions. These were held by the District Court to be 'cumulatively in violation of the Equal Protection Clause' . . . .
>
> "We hold that the findings of fact on which the District Court based its conclusion of a cumulative violation are not clearly erroneous but, to the contrary, are amply supported by the evidence."

Brinkman v. *Gilligan*, 503 F.2d 684, 693 (6th Cir. 1974) (A. 48), (*see* A. 12, 77). As will become apparent, the finding as to optional zones is the keystone to the arch since the other two findings could not independently support a ruling against the Dayton Board of Education.

Before an analysis is made of the adverse findings of fact, they should be placed in the context of the other findings made by the Trial Court. Although racial imbalance existed in the schools comprising the Dayton district, the student population of each school was consistent with the black-white distribution of population in the Dayton area (A. 5). All sixty-eight schools of the Dayton system – fifty-two elementary, five middle and eleven high schools, with the exception of the city-wide cooperative high school – were uniformly and impartially located in areas where students or potential students were concentrated (R. I. 1783, Vol. 18).[1] The Court found no evidence that school construction or site selection was segregative in nature or that the Board was ever guided in such matters by anything other than neutral criteria (A. 7). In compliance with section 3313.48 of the Ohio Revised Code attendance zones for each school, excepting the cooperative high school, were drawn so as to make access from home to school as convenient as possible for the greatest number of students (*see* R.I. 1560, Vol. 16). These zones were not irregular in shape (A. 5), were not gerrymandered (A. 6) and had remained essentially stable over the past twenty years (A. 278), notwithstanding changes in the student composition whereby

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[1] References in this brief to the record consisting of the twenty volumes transcribed during the violation hearing held in November and December of 1972 will consist of the designation R. I., followed by the page and volume number; references to the record consisting of the remedial hearings held in February of 1975 will consist of the designation R. II. and the references to the record of the remedial hearing held in December, 1975 and March, 1976 will consist of the designation R. III.

many of the schools changed from predominantly white to predominantly black (*see* Def. AR, R. I. 1237, Vol. 12; R. I. 2011, Vol. 20). Where construction of new schools required boundary changes, the changes have been rational, reasonable and within the sound discretion of the Board (A. 5). White students have not been bused past black schools to white schools, and black students have not been bused past white schools to black schools (A. 5).

In 1969 assignment patterns were modified by enactment of a Freedom of Enrollment Policy which permitted student transfers for the purpose of improving racial balance (R. I. 1335, Vol. 13). This program was not operated in any manner so as to discriminate against any student and free transportation was provided starting in 1972 (*see* A. 9). There was no evidence of inequality of facilities in the Dayton school system or inequality in instruction or curriculum opportunities (A. 30).

Starting in the 1951-52 school year black teachers were gradually assigned to white or mixed schools, and by 1969 each school in the Dayton system had an integrated teaching staff (A. 4). In 1969 the Dayton School Board employed more black teachers than any of the other twenty largest school districts in the State of Ohio, and in the fall of 1971 the teaching staff in each school in the system became organized so that the staff in each school substantially reflected the ratio between the number of black and white teachers employed in the entire Dayton system (A. 4). The teaching staff as of the date of the Trial Court's initial order remained substantially integrated, and with respect to non-teaching and non-administrative personnel the Court found that blacks comprised thirty-eight percent of the total work force for the school years 1971-72 and 1972-73 (A. 4).

Against these positive findings in the areas of school construction, site selection, attendance zones, assignment patterns, facilities, faculty and non-teaching staff, the Court raised three negative findings that it characterized as a cumulative violation of the Constitution (A. 12). In doing so it was careful to circumscribe its negative findings by holding that

the Dayton School Board did not at any time "maintain a dual system of education" (A. 75, 77).

In its opinion following the first remand from the Sixth Circuit the District Court stated that:

> "The defendant School Board of the City of Dayton had engaged in activities which were segregative in effect and which did impinge upon the constitutional rights of students in such system. At no time, however, did defendant maintain a dual system of education. (A. 75).
>
> "We do not deal with a mandated dual school system we do not deal with actions taken on a school-by-school basis. We do deal with a system that has in the past permitted segregative practices to exist." (A. 77).

This holding of a non-dual system not only establishes that the Dayton district was not operating a mandated dual system as proscribed in *Brown I;* it also confirms that the cumulative constitutional violations did not constitute state-imposed segregation in a substantial or significant portion of the district as proscribed in *Keyes.*

In light of the positive findings and the holding of non-duality, an analysis of the negative findings is necessary for purposes of determining the scope of the remedy.

a. The adverse finding of racially imbalanced schools has no independent constitutional significance.

The Court's first adverse finding – a condition of racial imbalance in schools as a result of the geographic distribution of races in the school system – was admitted by the defendant at the outset of the case. Such a finding, however, is constitutionally innocuous in and of itself. *Lawlor* v. *Board of Education of City of Chicago,* 458 F.2d 660 (7th Cir. 1972), *cert. denied,* 413 U.S. 921 (1973); *Bradley* v. *School Board of City of Richmond,* 462 F.2d 1058, 1069 (4th Cir. 1972), *aff'd equally divided court,* 412 U.S. 92 (1973); *Spencer* v. *Kugler,* 326 F. Supp. 1235 (D. N.J. 1971), *aff'd,* 404 U.S. 1027

(1972); *Deal* v. *Cincinnati Board of Education*, 419 F.2d 1387 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971).

This Court has left no room for doubt as to the significance of a finding of racial imbalance in a school system.

> "That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is 'a current condition of segregation resulting from intentional state action . . . the differentiating factor being between de jure segregation and so-called de facto segregation . . . is *purpose* or *intent* to segregate.'"

Washington v. *Davis*, 426 U.S. 229, 48 L.Ed.2d 597, 608 (1976), quoting *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 205, 208 (1973). Proof of racially discriminatory intent or purpose — not mere proof of racial imbalance — is required to show a violation of the Equal Protection Clause. *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, — U.S. —, 50 L.Ed.2d 450, 464 (1977). While racially identifiable schools do not violate the Constitution, the predicate for the Sixth Circuit's affirmance of the racial balance plan was — ironically enough — the existence of identifiable one-race schools. *Brinkman* v. *Gilligan*, 518 F.2d 853, 855-56 (6th Cir. 1975) (A. 93), *cert. denied*, 423 U.S. 1000 (1975).

b. The adverse finding with respect to rescission of the resolutions of December 8, 1971 has no independent constitutional significance.

Like its first finding the Trial Court's third and last "cumulative" finding would not alone support a ruling against the Dayton Board. On December 8, 1971 a lame duck Board of Education, whose majority had lost the November, 1971 election, passed three resolutions. One of these resolutions required the elimination of all attendance zones with concomitant transportation of students on a large scale basis for the purpose of achieving a racial and economic balance of students within each school in the Dayton system. After several parliamentary maneuvers, the new Board majority on January 3, 1972 took action which in the opinion of the District Court constituted a rescission of the resolutions (A. 10-11).

While the rescission action was held by the District Court to have constituted an independent constitutional violation, the Sixth Circuit held simply that the rescission was part of the cumulative violation since rescission alone could not constitute a violation of the Constitution unless there was a constitutional duty to take the action that was rescinded. *Brinkman* v. *Gilligan*, 503 F.2d 684, 697 (6th Cir. 1974) (A. 55). If the Board was under no constitutional duty to adopt the December 8th resolutions, it had the same power to rescind them as it had to adopt them. The extent to which rescission of the resolutions could be considered the breach of a constitutional duty and therefore part of a cumulative violation is measured by whatever unfulfilled duty to remedy the effects of segregative acts the Constitution placed upon the Board as of December 8th.

The reasoning of the Sixth Circuit on this point was manifestly correct and in accord with prior decisions of this Court. *See, e.g., Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *cf. San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1 (1973). Any other reading would invite the creation of substantive constitutional rights by the exercise of ingenuity in the pursuit of parliamentary games.

c. The adverse finding with respect to optional zones, whether considered separately or as part of a cumulative violation, did not involve a substantial portion of the students in the Dayton system.

It is apparent that the finding with respect to optional zones is the keystone of the cumulative violations which the Court found to exist. Without this finding neither of the other two findings – racial imbalance and rescission of resolutions – would have any constitutional significance. Here at the core of the case the nature of the violation must be defined.

Numerous optional attendance areas were created in the Dayton system in the 1950's and early 1960's (*see, e.g.*, R.I. 1905-1917, Vol. 19). The optional areas, which permitted a student residing in a designated zone to attend one of two schools, were scattered throughout the system (A. 280) and were located so as to be equidistant from the two schools that they served (A. 278). Standards of access, safety, school capacity, convenience and prior patterns of attendance were the criteria governing the establishment of optional zones (R.I. 1878-1879, 1889-1890, Vol. 18).

The plaintiffs' own chief expert would not argue with these criteria, would admit that such optional areas were widely used by most big city school systems during the time period in question and would concede that such areas are used for legitimate reasons (A. 279). Indeed, it is self-evident that no optional zone ever excluded anyone from attending any school in the Dayton system; such a zone simply provided a choice between two schools for students living within its boundaries (*see* A. 280).

The District Court specifically held that "the majority of the optional zones had no racial significance at the time of their creation" (A. 8). It went on to hold, however, that four specific optional zones "may have constituted exceptions to this general rule" and that two of those four zones – Roosevelt-Colonel White and Kiser-Colonel White – "have had the most demonstrable racial effects in the past" (A. 8). In assessing

the current effect of these few optional zones and in reasoning back from effect to cause, the Court was less specific.

As *Keyes* and *Washington* have confirmed, the essential elements of de jure segregation are (1) a current condition of segregation resulting from (2) intential State action. On the issue of intent the District Court noted the role played by considerations of convenience of parents in the creation of optional zones and found that "at times this last concept embraced desires motivated by racial considerations" (A. 8). There was no finding that such motivation was in fact at work on either the Board or the affected parent level in the four optional zones found to have had racial significance at the time of their creation. The Court simply supported its holding of segregative intent on the thread of generalized considerations of parental convenience.

On the issue of current condition the Court found no racial effects of the optional zones at the elementary school level – "none of the elementary school optional zones today have any significant potential effects in terms of increased racial separation" (A. 8). The only elementary school zone (Westwood-Jackson) listed as having had possible racial significance at the time of its creation in 1952 remained in effect up to and including the time of trial even though the two schools affected had been predominantly black for the latter part of that twenty year period (A. 17, *see* Def. Ex. AR, *supra*, at 18).

This leaves three high school optional zones (Fairview-Roth, Kiser-Colonel White and Roosevelt-Colonel White, A. 8) as the constitutionally offensive product of the Court's attenuated finding of segregative intent.

The first of these three zones is clearly *de minimus*. The Fairview-Roth optional area was created in 1965 at which time Roth was 53.5 percent black and Fairview was 0.9 percent black (A. 17). There is no evidence that the creation of this area was in fact motivated by any segregative purpose. The area was small (A. 280) and its creation had no significant racial consequences. In fact, from the time of creation

of the area until the 1972-73 school year only three students took advantage of the option, and this exercise of the option did not occur until six years after the area was created (A. 281).

The second high school zone – the Kiser-Colonel White optional area – was between predominantly white schools (A. 282) and had no racial significance at the time of its creation in 1962 (A. 17). At the start of the 1963-64 school year, the black composition of Kiser was 2.7 percent and that of Colonel White was 1.1 percent (A. 17). During the ensuing ten years, the black composition at Colonel White increased to 54.6 percent and that of Kiser to 9.8 percent (A. 17). At no time during this period did the Board attempt to respond to the changing composition of these schools by altering the optional zone (*cf.* R. I. 1302-1303, Vol. 13). Moreover, from 1967 through 1971 only 129 students took advantage of this option (A. 281).

The last and largest of the optional zones determined by the Court to constitute a racially significant result of Board action was the Roosevelt-Colonel White optional area. The greatest bulk of this area was created in 1951 (A. 17) and the remainder of the area which constituted a couple of city squares was added in 1959 (A. 282). The extent to which parental convenience masking racial considerations played a role in the creation of this area remains speculative. There was persuasive evidence that problems of industrial expansion, access and increased availability of public transportation led to the establishment of the area (R. I. 1890-1894, Vol. 18).

The initial effect of the area on racial separation is likewise dubious. In 1951 Roosevelt was 31.5 percent black and Colonel White had no black students (A. 17). From 1951 until 1957 the percentage of black students at Roosevelt had only increased from 31.5 percent to a minimum of 35 percent and a maximum of 40 percent (R. I. 796, Vol. 8). This optional area was not changed at any time since 1957 (A. 282), and its net effect as years passed and populations shifted could be characterized as integrative rather than segregative.

Had the optional area reflected a segregative intent on the part of the Board to permit some whites to depart from an increasingly black student body at Roosevelt, it would have been logical for the Board to have eliminated the option once blacks moved into the area. The optional zone, however, remained unaltered, and it ultimately served to enable more blacks to attend a mixed racial setting at Colonel White (A. 283).

This, then, is the nature of the violation found by the District Court. Against the background of racial imbalance generated by residential patterns in the community, the Dayton Board created four optional attendance areas that may have had "potential effects in terms of increased racial separation" (A. 8). While the establishment of such areas was largely guided by neutral criteria, the Board's consideration of convenience of parents may have caused it to yield to "desires motivated by racial considerations" (A. 8). Thus, purpose or intent to segregate was found to underlie the limited violations found to exist. Since the Board had a constitutional duty to remedy those violations, its rescission of resolutions which *inter alia* would have accomplished that result was to the extent of that duty a cumulative violation of the Constitution.

2. The Sweeping Remedy Imposed In This Case Should Be Restructured In Relationship To The Nature Of The Violation.

Despite the countless man-hours that have been spent in chasing the will-o'-the-wisp of a system-wide plan that would satisfy the mandates of the Sixth Circuit, it requires no exercise in abstruse metaphysics to fashion a remedy with a scope designed to cure the nature of the violations found to exist in this case. The first step would be to eliminate the offending optional zones. This has been done. The second and final step would be to eliminate any effect of increased racial

separation the zones may have produced at the three high schools in question.

In the latest commentary from this Court on the core principle that the nature of the violation determines the scope of the remedy, Mr. Justice Powell has suggested that the appropriate test of an equitable remedy is whether the evidence indicates that the extent of integration sought to be achieved by the remedy "would have existed had the school authorities fulfilled their constitutional obligations in the past." *Austin Independent School District* v. *United States*, – U.S. –, 45 U.S.L.W. 3413 (U.S. Dec. 6, 1976) (per curiam). This, we respectfully submit, is a rational test that is in accord with historic principles of equity.

Application of the *Austin* test to the present case suggests that simple elimination of the optional zones would have been an adequate remedy. Had the zones not been created, housing patterns in Dayton suggest that by 1972 Roosevelt High School would have been predominantly black, Kiser High School predominantly white and Colonel White a relatively balanced mixture of races. This is in fact what occurred, and it is extremely doubtful that the pattern was altered or affected in any meaningful way by the optional zones between those schools. After all, the optional zones remained substantially unchanged from the time of their adoption while populations shifted and the complexion of schools changed.

Even assuming that the existence of the optional zones had a segregative effect at the schools in question, the requirements of an appropriate remedy have been satisfied by actions that have now been taken with finality. Roosevelt High School has been closed (A. 145); a new vocational school with a student body reflecting the racial composition of the district as a whole has been created at Kiser (A. 146); Colonel White, which had a student population approximating that district-wide ratio, required no alteration. The other aspects of the various plans that have consumed the energies of the parties and the courts in this case since February 7, 1972 have unfortunately been no more than efforts to appease the Sixth Circuit's "mine field" theory of desegregation remedies.

The plaintiffs in this case have long since recognized that the only way to avoid the conclusion that the remedy is disproportionate to the wrong and therefore inequitable would be to rewrite the original findings of fact. On each of the three appeals that have been taken from the District Court they have begged the Sixth Circuit to reconsider the refusal of the District Court to include other allegedly unconstitutional acts as part of the cumulative violation, but on each occasion the Appellate Court has refused to do so. The factual findings, both favorable and unfavorable, are fixed in this case, and they were supported by ample evidence. The facts were written before this case was tried; it is not they but the remedy which must be rewritten.

3. The Remedy Imposed In This Case Erroneously Elevates The Achievement Of Racial Balance To The Status Of A Constitutional Right.

The Sixth Circuit's departure from the remedial principles established by this Court stems less, we submit, from a readiness to impute to school officials a segregative intent more pervasive than the evidence justified than from an idealistic commitment to a concept that there can be no desegregation without the achievement of some degree of racial balance in every school. The violation is only significant as an excuse for a judicial foray into a realm of what can only be called sociological science fiction. Instead of exercising the traditional equitable role of constructing specific remedies to rectify specific violations of a legal or constitutional duty, it has erroneously assumed the more grandiose role of attempting to construct whole school systems on a racially utopian scale. However well intentioned such an effect may be, it exceeds the bounds of judicial power and competence and produces results that are punitive rather than remedial.

At the core of the confusion lies a misconstruction of the term "desegregation". By equating that term with elimina-

tion of racially identifiable schools, the Sixth Circuit continues to follow the assumption that schools cannot be truly desegregated unless the racial composition of the student body in each school substantially reflects the racial composition of students in the system as a whole. This Court, in prior litigation arising from the Sixth Circuit, has expressly declared such an assumption to be erroneous. *Milliken* v. *Bradley,* 418 U.S. 717, 740-41 (1974).

As a result of its persistence in this fundamental definitional error the Sixth Circuit has in effect established a new constitutional right that can only be enforced on a system-wide basis. The implications extend far beyond the Dayton school system. The plaintiffs' chief expert acknowledged that by his definition of segregation in terms of racial imbalance – which is essentially the definition adopted by the Sixth Circuit – there is only one known school system in the entire United States which is not segregated (R. I. 1538, Vol. 16). So long as this kind of confusion remains uncorrected the Sixth Circuit and other courts will continue to ignore the nature of the violation while fashioning the scope of the remedy.

It is fascinating to observe the metamorphosis of the District Court's approach in this case under the pressure of successive reversals by the Sixth Circuit. In its initial opinion it carefully outlined its specific findings of fact and delineated the outline of a remedy appropriate to those findings (A. 12). In reviewing the plans submitted after the first remand it rejected the plaintiffs' plan which was designed to assign students among the Dayton schools in a black/white ratio approximating the district-wide ratio for such schools with a variation of fifteen percent, plus or minus, from the mean with the comment that, "[t]he obligation does not exist to create racial balance which is in essence the sole function of the plaintiffs' plan" (A. 79).

After the second remand, however, the District Court surrendered its efforts to follow the principles established by this Court and announced that the *sine qua non* of any plan

would be precisely the racial balance which it had previously characterized as a non-existent obligation:

> "Given the predicate that the limited segregatory activities found by this Court in its order of February 7, 1973, brings this matter within the ambit of *Swann* and *Keyes,* the remedy must be obvious. This Court now reaches the reluctant conclusion that there exists no feasible method of complying with the mandate of the United States Court of Appeals for the Sixth Circuit without the transportation of a substantial number of students in the Dayton school system. (A. 100).
>
> ". . . [t]his Court does therefore ORDER that as of September 1, 1976, each and every school in the Dayton school district will have a pupil population approaching the district percentage, but deviating no more than fifteen percent, plus or minus." (A. 103).

Two reversals were enough to supplant the precepts of the Trial Court with the Sixth Circuit's "mine field" theory of desegregation remedies.

In its reluctant acceptance of the Sixth Circuit's erroneous theory the District Court articulated a principle that has been implicit, although unstated, in the decisions of the Sixth Circuit:

> ". . . [i]t is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.
>
> "The only feasible method of sharing requires a balancing in each school between black and white students in a ratio approximating the system-wide balance." (A. 102).

The Sixth Circuit attempted to write off this language as a judicial slip of the pen, but it is not enough to say that, "read literally the quoted language does appear to create a right which the federal courts have never recognized." *Brinkman* v.

Gilligan, 539 F.2d 1084, 1087 (6th Cir. 1976) (A. 122). Whether the Sixth Circuit has or has not recognized the "right", it has certainly attempted to create it by ignoring the equitable principles involved in the fashioning of desegregation remedies and requiring the elimination of racially identifiable schools whenever any constitutional violation, however limited in effect, has been established.

The constitutional right involved in this case is simply the right not to be excluded from any school "directly or indirectly on account of race". *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971). Ever since *Brown I* the objective of federal courts in school desegregation cases has been the elimination of a dual system; that is, racial segregation arising out of mandatory state statutes or constitutions and racial segregation arising out of intentional state actions affecting a substantial portion of a school district. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 203 (1973). Since the Dayton district has not operated a dual system, there exists no basis for the judicial decree ordering the assignment of students on a racial basis. *See Swann* v. *Charlotte-Mecklenburg Board of Education, supra* at 28.

In transforming the constitutional right from a right not to be excluded from any facility into an affirmative right to be included in every facility, the Sixth Circuit implicitly and the District Court explicitly have strayed from these fundamental principles. With this Court rests the burden of returning the law in this area to its proper path and restoring the constitutional right involved to its proper form.

4. The Remedy Imposed In This Case Violates The Equal Educational Opportunities Act of 1974.

While it is unnecessary to go beyond the basic principles established by the Constitution and prior decisions of this Court to resolve the questions presented by this case, it is important to note that the "mine field" approach used by the lower courts to impose a system-wide racial balance on the

Dayton schools is also in direct conflict with the statutes that have been enacted in this area. Under the Equal Educational Opportunities Act of 1974 a court can impose only those remedies which are essential to correct particular denials of equal protection of the laws. 20 U.S.C. § 1712. The Act specifically prohibits a court from ordering transportation for the purposes of racial balance. 20 U.S.C. §§ 1751, 1754.

The Sixth Circuit accepted the respondents' argument that the language of section 1702(b) of the Act – to the effect that the Act was not intended to modify or diminish the authority of the courts to enforce fully the Fifth and Fourteenth Amendments – was an exception that swallowed up all the rules that the Act purported to establish. *Brinkman* v. *Gilligan*, 518 F. 2d 853, 856 (6th Cir.) (A. 95), *cert. denied*, 423 U.S. 1000 (1975). The Act, like the nature of the Board's violations, was perceived as immaterial to the task of eliminating racially identifiable schools.

Yet the intent of Congress in enacting Chapter 39 of the 1974 Act was clearly to focus attention on the core principle that the nature of the violation determines the scope of the remedy and to establish an obligatory order of remedies or combinations thereof which would be uniformly followed by the courts. When – and only when – these remedies are insufficient to correct a constitutional violation, the language of section 1702(b) comes into play. This construction is not only logically sound; it is also constitutionally sound – logical in the sense that a legislative provision is given a meaning that does not completely vitiate the remaining provisions in the enactment and constitutional in the sense that such a construction does not raise any constitutional issue.

The Act cannot be cavalierly disregarded as waste paper. It does serve to provide the judiciary with material assistance in answering remedial questions in state-imposed segregation cases. *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 17-18 (1971). Except where – but for the exception contained in section 1702(b) – it would conflict with constitutional requirements it is the law of the land.

It is apparent that the sweeping remedy imposed in this case was not constitutionally mandated. As a racial balance plan requiring transportation for purposes other than the elimination of constitutional violations, it is contrary to and violative of the congressional prohibitions contained in the Equal Educational Opportunities Act of 1974.

B. IN A SCHOOL DESEGREGATION CASE THE IMPOSITION OF A DECREE WHICH REQUIRES A FIXED RACIAL BALANCE FOR EACH AND EVERY SCHOOL IN THE SYSTEM IS INVALID.

While the Sixth Circuit attempted to soft-pedal the District Court's plus or minus fifteen percent mathematical formula as a "flexible starting point," such is simply not the case. The same formula was rejected in Michigan because of its adherence to fixed racial ratios. *Bradley* v. *Milliken*, 411 F. Supp. 943 (E.D.Mich. 1975), *modified*, 540 F.2d 229 (6th Cir. 1976). The District Court's exclusion of junior and senior classes from the plan is applicable only for the current classes and will have no effect or flexibility in future school years. The permitted deviations from the proposal of the Master likewise do not demonstrate flexibility since any permissible modification cannot deviate from the plus or minus fifteen percent requirement (A. 112, 115).

The racial balance formula in this case was in fact clamped onto the school district with adamantine bonds. That conclusion is demonstrated not only in the actual achievement of the objective but by the following actions, statements and rulings of the District Court.

(a) The Master's rejection of the Court's guidelines for maximum time and distance on transportation of students was approved (R. III. 313, *see* A. 162).

(b) Any deviations from the racial percentage on a school-by-school basis for geographic reasons was barred.

(The projected elementary assignments fall within plus or minus seven percent of the black-white ratio of the entire district and, excepting present juniors and seniors, the high school assignments fall within the required racial percentage.)

(c) The plan transmitted by the Board was considered solely in the context of racially balancing the district as a whole (A. 101).

(d) A "constitutional right" of students to share equally all facilities of a school system, enforceable by a balancing of students in each school, was established and granted (A. 102).

(e) A desegregated school was defined as one which has a black-white mix that reflects, within plus or minus fifteen percent, the district ratio (A. 103, 109).

(f) It was unequivocally ordered that as of September 1, 1976 each school in the Dayton system must have a pupil population that deviates no more than plus or minus fifteen percent from the racial ratio of the district (A. 103).

(g) The Master's elementary pairing plan which assigns students on the basis of the racial balance requirement was adopted (A. 110), and the Board's suggestion of a phase-in for eight schools was rejected (A. 111, R. III 378, 439-41).

(h) The Master's rejection of the assignment guidelines contained in the court order of December 29, 1975 was accepted.

(i) Only schools which are properly racially balanced were held acceptable for purposes of a desegregation remedy (A. 103, 105-106).

(j) The plus or minus racial balance requirement set forth in the December 29, 1975 order was reaffirmed as an essential component of any plan in the order of March 23, 1976 (A. 111).

If racial balance is the "starting point" of the Court's plan, it is also the "ending point".

The fundamental defects in the plan imposed in this case render its future difficult to conceive or chart. The articulation of the plan in terms of a fixed racial formula suggests that the ratio imposed by the Court is a permanent ratio so that adjustments of student assignments would be required each year as long as the system exists to maintain the ratio in each school. Before the Dayton plan reached the Sixth Circuit, however, this Court expressly declared that a requirement of such annual adjustments is beyond the authority of a court of equity. Once a court has corrected perceived constitutional violations on the part of a defendant school board, its role is concluded even though subsequent changes in the racial mix in the schools might be caused by factors for which the defendant could not be considered responsible, *Pasadena City Board of Education* v. *Spangler*, — U.S. —, 49 L.Ed.2d 599, 608 (1976).

The Sixth Circuit dodged the implications of the *Pasadena* decision by stating that the District Court's plan "directs no changes after the 1976-77 school year." *Brinkman* v. *Gilligan*, 539 F.2d 1084, 1087 (6th Cir. 1976) (A. 123). Yet the problem of perpetuities remains inherent in any system-wide racial balance remedy, and another school year is fast approaching. If the base line of the plan is a plus or minus fifteen percent racial balance in each school, how can the base line be maintained without annual adjustments of student assignments? It requires no crystal ball to predict that population shifts will continue to occur as they have occurred in the past, and it can be anticipated that with the passage of time both schools in at least some of the pairings will become predominantly black or predominantly white.

Should the Dayton Board annually adjust the whole network of pairings to maintain the racial balance ratios? *Pasadena* says, "No." Should it continue to drain its financial resources in order to bus black children from one predominantly black school to another or white children from one predominantly

black school to another? Common sense says, "No." Should it dismantle pairings as their significance in terms of racial balance becomes frustrated by population shifts? If so, the plan will be perceived as a failure.

The posting of these unanswerable questions is demonstration of the confusion that results when courts leave their traditional role of shaping particular remedies to particular wrongs and attempt to reshape society itself by judicial decree. In defining "desegregated" as synonymous with "racially balanced" and thereby requiring a particular degree of racial mixing as an essential component of desegregation, the District Court and the Sixth Circuit have mandated a fixed racial balance formula not as a simple starting point, but as an inflexible test for determining school desegregation. This approach is contrary to *Swann* and is not required by the United States Constitution. *Carr* v. *Montgomery County Board of Education*, 377 F.Supp. 1123, 1133 (M.D. Ala. 1974), *aff'd*, 511 F.2d 1374 (5th Cir.), *cert. denied*, 423 U.S. 986 (1975).

C. THE CONSTITUTION CANNOT BE DEEMED TO MANDATE A DESEGREGATION REMEDY THAT WILL RESULT IN RESEGREGATION OF STUDENTS SERVED BY THE SCHOOL SYSTEM.

The first test of the propriety of a desegregation remedy lies in the relationship it bears to the nature of the constitutional violations found to exist. The second test is whether it is guided by a purpose to desegregate rather than misguided by some constitutionally irrelevant purpose such as securing of racial balance. The third and final test is whether the remedy can be perceived as satisfying a pragmatic standard of effectiveness. The plan dictated and approved by the Sixth Circuit in this case fails the third test as well as the first and second tests.

The holdings in *Swann* require a "balancing of the individual and collective interests" and the taking of necessary steps to convert the school system to a "unitary system". *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). The promise that a plan will work must be "realistically" made. *Green* v. *County School Board*, 391 U.S. 430 (1968). The judicial effort should be an effort to achieve the greatest degree of actual desegregation "taking into account the practicalities of the situation." *Davis* v. *Board of Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). Thus the final test of a plan is not whether it satisfies some abstract philosophical model, but whether all of the factors relevant to its actual success or failure have been pragmatically weighed and balanced. Is the plan reasonably calculated to satisfy the end desired?

The evidence presented at the hearings establishes that as a result of the demographic situation existing in the Dayton district any effort to achieve racial balance in each school in the system requires pairing and clustering of schools (A. 298-299) with concomitant busing of approximately fifteen thousand students. In his search for a racial balance remedy the District Judge accordingly adopted these devices despite unequivocal testimony from the respondents' own expert witness that they have not worked in the past and eventually result in a poor city with a poor school system (A. 291-294). Injunctive relief in such cases cannot extend to parents of school children, and for a variety of reasons a forced busing plan can be expected to drive whites and upper middle class blacks out of the system, leaving behind a low economic, predominantly black student population.

The recent history of other school districts undergoing desegregation accomplished by massive transportation plans confirms the gloomy prediction of the respondents' expert in this case. *See, e.g., Calhoun* v. *Cook*, 522 F.2d 717 (5th Cir. 1975). The issue presented is not a rhetorical issue of pro and con arguments regarding "forced busing", nor is it a sociological issue of refusal of the majority to recognize rights of the

minority. The issue, simply stated, is "Will the desegregation plan work?" If the remedy causes such a burden on the educational process that any students who can afford to do so will leave the system, the remedy is obviously a failure. The record establishes that during the five years this case has been in the courts 11,000 white and 900 black students have left the Dayton system (A. 301).

Certainly a remedy which defeats the goal of providing an equal educational opportunity for minority students and which will lead to resegregation of the city's schools is not constitutionally mandated. Indeed, an ironic and sad situation is presented when in the name of the Constitution, the rights and the opportunities which the Constitution was designed to protect are destroyed. The action of a federal court in imposing a plan that would inevitably lead to resegregation of the school system is no less a segregative practice than those unconstitutional practices which initially required federal intervention.

D. A COURT IS WITHOUT POWER TO IMPOSE A DECREE IN A SCHOOL DESEGREGATION CASE WHERE THE COMPLAINANTS HAVE FAILED TO ESTABLISH THAT ANY INJURY TO THEM HAS OCCURRED OR THAT THE ACTION IS MAINTAINABLE AS A CLASS ACTION.

The complaint in this case alleged that the individual adverse respondents were children or parents of children attending schools in the Dayton system and that the parent adverse respondents were bringing the action on their own behalf, on behalf of their minor children and on behalf of other children similarly situated. The N.A.A.C.P. joined in the action on behalf of its members who were allegedly members of the class. The allegations of capacity and class representation were denied in the answer filed by the Dayton Board.

The adverse respondents were again alerted by the pretrial order to the fact that questions of standing and capacity were

challenged. At the close of the respondents' case, the Dayton Board again raised the issue of whether they were members of the class they purportedly represented and whether this action was properly maintainable as a class action. (A. 124). The respondents made no response to the Board's motion and made no request to present evidence on these fundamental issues. The District Court completely ignored the issues.

On appeal the Dayton Board renewed its contention that the Court could not proceed to a disposition of the respondents' claims in the face of a total absence of any evidence to support a finding that the action was properly maintainable as a class action. The only indication that the Sixth Circuit reached this issue is its statement that "all contentions of the parties contrary to the conclusions reached in this opinion have been carefully considered and are found to be without merit." *Brinkman* v. *Gilligan*, 503 F.2d 684, 704 (6th Cir. 1974) (A. 69).

No explanation of just why this contention of the Dayton Board is without merit has yet been suggested by any court in five years of litigation. While desegregation cases raise significant social issues, the significance of the issues should not change basic procedural concepts and burden the federal courts with the responsibility of rendering far-reaching decisions at the request of curious bystanders.

1. The Record Is Void Of Any Evidence That Any Of The Adverse Respondents Sustained Any Injury Or Was Deprived Of Any Constitutional Right.

In the absence of proof that they were injured or deprived of some constitutional right the adverse respondents cannot prevail in this equity action. *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, — U.S. —, 50 L.Ed.2d 450, 462 (1977); *O'Shea* v. *Littleton*, 414 U.S. 488, 493-94 (1974); *McCabe* v. *A.T. & S.F. Railway Co.*, 235 U.S. 151, 162 (1914). Although the District Court

predicated jurisdiction under the Equal Protection Clause of the Fourteenth Amendment and under 42 U.S.C., sections 1981 and 1983 and 28 U.S.C., section 1343, jurisdiction does not exist in the abstract. Courts deal with particular rights of particular people, and the adverse respondents cannot prevail on the merits in the absence of proof of a violation of their rights under these provisions. *Cf. Bell* v. *Hood*, 327 U.S. 678 (1946). Comb the record for such proof. No scintilla exists.

A school desegregation case is no different from any other case in this respect. It was encumbent upon the adverse respondents to establish that one of them, or at least some member of the N.A.A.C.P., was excluded from a school in the Dayton system on account of race. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971). None of the adverse respondents ever testified at the trial of this action, and none of the evidentiary exhibits established that any one of them was ever excluded from attending any school in the Dayton system. In addition to their failure to establish the minimal requirement of injury or deprivation of a constitutional right, the adverse respondents failed to establish that any one of them was a school child or a parent of a school child or that any of them ever attended or sought to attend school in the Dayton system.

If the District Court had jurisdiction to proceed to a determination of this case, the same anonymous collection of respondents have standing to file a similar law suit against every school board in the United States.

2. The Record Is Void Of Any Evidence That Any Of The Adverse Respondents Was A Member Of The Class They Purportedly Represented And There Was No Determination That This Action Was Maintainable As A Class Action.

The propriety of this action as a class action under Rule 23 of the Federal Rules of Civil Procedure is dependent

on proof from the individual adverse respondents that they are members of the class they purportedly represent. *Bailey* v. *Patterson*, 369 U.S. 31 (1962). It is further dependent upon certification by the District Court that the suit is maintainable as a class action. *Pasadena City Board of Education* v. *Spangler*, – U.S. –, 49 L.Ed.2d 599, 605 (1976). Neither of these requirements was met.

Were any of the adverse respondents members of the class that was allegedly, directly or indirectly, excluded from some school or schools in the Dayton system? Did any of them or any of their children ever attend any of the high schools found to be racially affected by optional zones? Did any of them or any of their children ever attend any Dayton school? Do any of them even live within the geographic boundaries of the Dayton school system? Are there any members of the N.A.A.C.P. who are also members of the class it purports to represent in this case? The answers to these questions will emerge from the lips of the inscrutable sphinx as readily as they will be found in the silent record of this case. The lack of such proof bars the maintenance of this law suit as a class action. *Davis* v. *Schultz*, 453 F.2d 497 (3d Cir. 1971); *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

Not only was there a failure to establish that any of the adverse respondents was a member of the class they purportedly represented, there was a failure on the part of the District Court to determine that this action was or was not maintainable as a class action. That failure, in and of itself, defeats the adverse respondents' desire to pursue this litigation as a class action.

VIII. CONCLUSION

The history of this case reveals a District Judge drawn by the magnetism of a significant social issue to disregard essential procedural requirements in order to address the substantive questions presented. In the first phase of the litigation he did an able job of finding the facts and attempting to apply the pertinent case law to those facts. Under pressure from successive reversals by the Sixth Circuit and with an evident sense of frustration, however, he ultimately imposed a sweeping remedy that bore no relationship whatsoever to what he referred to as "the limited segregatory activities found by this Court." (A. 100).

In doing so he violated the fundamental principle of fashioning appropriate remedies in desegregation cases. To borrow Mr. Justice Powell's succinct phrase, "A remedy simply is not equitable if it is disproportionate to the wrong." *Austin Independent School District* v. *United States*, – U.S. –, 45 U.S.L.W. 3413 (U.S. Dec. 6, 1976) (per curiam). He compounded the error by succumbing to the definitional confusion that has marred the efforts of the Sixth Circuit in desegregation cases. Once "desegregation" is defined in terms of elimination of racially identifiable schools instead of elimination of exclusions from schools on the basis of race, the path of error is easily traveled to the conclusion that the constitutional right to be free from state-imposed segregation is a constitutional right to share equally in all state facilities. The "obvious" way to enforce this right to share is to recast every school system in the United States in a judicial mold of racial balance.

Thus we arrive at a plan that bears no relationship either to perceived constitutional violations or to anything that would have been produced by the natural, unregulated actions of human beings. It fails the equitable tests of propriety and purpose. It also fails the test of pragmatic effectiveness. If, as the evidence suggests, the inexorable ultimate effect of the plan will be resegregation as a result of shifting population

groups, the goal of equal educational opportunities which the Constitution should serve has been subverted. The plan imposed in this case is not a product of constitutional mandate; it is a product of judicial confusion.

What relief should issue from this Court? Should the action simply be remanded with instructions that the lower courts impose a realistic plan that remedies only the limited constitutional violations that have been found to exist? We respectfully submit that those violations have been determined and confirmed through successive appeals. They have been extirpated root and branch from the Dayton system.

No optional zones exist; Roosevelt High School has been closed; a systemwide vocational school with a racially balanced student composition has been created at Kiser; no trace of the practices that were held to offend the Constitution can be found in the school system. Even had there been a basis established in the evidence for the District Court's assumption of jurisdiction in the first instance, there is no basis for the continuance of that jurisdiction at this stage. The case against the Dayton Board of Education should be dismissed with instructions that the Board should consider itself free to retain or reject those features of the plans imposed upon it that were not related to the limited violations found to have existed.

Respectfully submitted,

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No. 76-539

DAYTON BOARD OF EDUCATION, et al., *Petitioners,*

v.

MARK BRINKMAN, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-539

Dayton Board of Education, et al., *Petitioners,*

v.

Mark Brinkman, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS

PRELIMINARY STATEMENT

At least two good things are happening in Dayton, Ohio, this school year for the first time ever. Black and white children are attending public school together in significant numbers, and their attendance in this fashion is pursuant to a desegregation plan which is fair and equitable to both races and demeaning to neither. Second, the Equal Protection Clause of the Fourteenth Amendment to the Constitution as applicable to public education is receiving substantial vindication in the Dayton school district. These happy re-

sults derive from unhappy circumstances; longstanding policies and practices of *de jure* segregation requiring federal judicial intervention. This lawsuit has, to date, produced numerous hearings, opinions and orders in the district court, three appeals and one denial of certiorari. The case appears considerably more complex than it actually is, however, primarily because the district judge grappled most ineffectively with settled constitutional principles and terminology and most reluctantly with the facts. But the essential determinative facts have been found by the courts below or they are uncontestable. On the basis of these facts, the United States Court of Appeals for the Sixth Circuit Court has, on three separate occasions, adjudged plaintiffs' constitutional right to a system-wide remedial plan of pupil desegregation based on the nature and extent of the violation. *Brinkman* v. *Gilligan,* 503 F.2d 684 (6th Cir. 1974) [hereinafter, "*Brinkman I*"]; 518 F.2d 583 (6th Cir.) ["*Brinkman II*"], *cert. denied sub nom.,* 423 U.S. 1000 (1975); 539 F.2d 1084 (6th Cir. 1976) ["*Brinkman III*"], *cert. granted sub nom.,* —— U.S. — (1977) (the instant case). Following *Brinkman II* the district court appointed a Master and, upon receipt of his report, ordered into effect a plan of desegregation which has considerable potential for uprooting two-thirds of a century of unabated state-inflicted racial separation in the Dayton public schools. That plan has been approved in *Brinkman III* as a fair, sensitive, flexible and otherwise equitable response to the entrenched constitutional wrong.

In proper perspective, therefore, this case raises the following:

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Dayton Board of Education meet its burden of showing that it dismantled the basically dual school system inherited at the time of *Brown* v. *Board of Education,* 347 U.S. 483 (1954), following which the system-wide racial segregation extant at the time of trial adventitiously reappeared?

2. Did the Dayton Board, under *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973), rebut plaintiffs' *prima facie* case of system-wide intentional segregation?

3. If the Dayton Board failed to meet either of these burdens, did the system-wide remedial plan of pupil desegregation approved below require a fixed racial balance or otherwise constitute an abuse of equitable discretion?

4. Do plaintiffs have standing to bring this action in their own right and as representatives of the class?

STATEMENT OF THE CASE

A. Prior Proceedings

Black and white parents and their minor children attending the Dayton, Ohio public schools, and the Dayton Branch of the National Association for the Advancement of Colored People [hereinafter, "plaintiffs"], filed their complaint April 17, 1972 in the United States District Court for the Southern District of Ohio. Defendants included the Dayton Board of Education and its individual members, and the Superintendent of the Dayton Public Schools [hereinafter "petitioners" or "Dayton Board" or "Board"], and the Governor, Attorney General, State Board of Edu-

cation and Superintendent of Public Instruction of Ohio [hereinafter, "State defendants"].[1] Plaintiffs alleged that all of these defendants were responsible for operating a racially segregated public school system in violation of the Fourteenth Amendment and federal civil rights statutes, 42 U.S.C. §§ 1981, 1983-1988, and 2000d.

Trial limited by the district court to whether the Dayton public schools are unlawfully segregated by race pursuant to actions of the Dayton Board began November 13, 1972 and concluded on December 1. On February 7, 1973 the district court issued its Findings of Fact and Memorandum Opinion of Law concluding that various actions on the part of the Dayton Board defendants and their predecessors "are cumulatively in violation of the Equal Protection Clause." A.12.[2] The Court thereupon ordered the Dayton Board to

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[1] The State defendants are not parties to this appeal, as no orders have been entered against them below. The State Superintendent and the State Board of Education have, however, filed an *amicus* brief with this Court, the principal purpose of which appears to be to get this Court to prejudge an issue now pending in the district court: a motion filed by the Dayton Board seeking an order requiring the State defendants to participate in the implementation of the desegregation plan ordered below. We caution only that the figures set out in the State Board's *amicus* brief (pp. 2-3) have not been tested in the adversary process, and no assumptions about them are warranted.

[2] "A. ——" references are to the printed two-volume appendix. With respect to matters not included in the appendix, we cite to the original record in the same manner employed by petitioners. *See* Pet. Br. at 17n.1. "R.I." refers to the pages in the consecutively-paginated twenty-volume transcript of the November-December, 1972 violation trial; "R.II." to the transcript of the February 1975 remedial hearing; and "R.III." to the December 1975 and March 1976 remedial hearing. "PX" refers to plaintiffs' evidentiary exhibits and "DX" to those of defendants.

submit a remedial plan of desegregation; the Dayton Board purported to comply through a submission of March 29, 1973. A.131-44. By its Supplemental Order on Remedy filed July 13, 1973 (A.25-31), the district court, while expressing disappointment at the Board's submission, approved the Board's limited proposal on a tentative basis. Both plaintiffs and defendants appealed.

On August 20, 1974 the Court of Appeals for the Sixth Circuit filed its opinion in *Brinkman I,* 503 F.2d 684 (A.32-69). The court of appeals affirmed the district court's finding that the Dayton school system was being operated in violation of the Constitution, but the court of appeals also concluded that the Board's proposed cure for that violation was inadequate in light of the scope of the violation. A.68. Accordingly, the case was remanded to the district court to formulate a constitutionally adequate desegregation plan. The Dayton Board did not seek review in this Court of the judgment in *Brinkman I.*

On remand the district court, by order of January 7, 1975 (A.70-72), directed the submission of new desegregation plans, upon which (A.144, 154) a hearing was held on February 17, 19 and 20, 1975. On March 10, 1975 the district court entered an Order provisionally adopting another limited plan submitted by the Board. A.73-84. The plaintiffs immediately appealed seeking summary reversal on the ground that the plan and the reasoning adopted by the district court were plainly inadequate and in direct conflict with the mandate of the court of appeals.

On June 24, 1975 the court of appeals issued its opinion in *Brinkman II,* 518 F.2d 853 (A.89-96). The court denied plaintiffs' motion for summary reversal

because of the short time remaining before commencement of the 1975-76 school year; but the court remanded the case with directions that the district court "adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this Court and to the decisions of the Supreme Court in *Keyes* and *Swann*." A.96. The court of appeals directed that its mandate issue forthwith. The Dayton Board sought review in this Court, and certiorari was denied on December 1, 1975. 423 U.S. 1000. On remand, following evidentiary hearings and the appointment of a Master, the district court entered an order on March 23 (A.110-13) and a judgment on March 25 (A. 114-16), modified by order of May 14, 1976 (A.117), essentially adopting the desegregation plan recommended by the Master but granting the Board the option to implement equally effective alternatives.

Defendants' appeal was heard on an expedited basis, and the court of appeals issued its decision in *Brinkman III* on July 26, 1976, 539 F.2d 1084 (A.118-23). The court rejected the Board's objections to the plan of desegregation approved by the district court. The court of appeals and Circuit Justice Stewart denied the Board's applications for stay on August 16 and August 19, 1976, respectively. The plan thus became operative at the start of the 1976-77 school year, as required by *Brinkman II* and confirmed by *Brinkman III*. This Court granted the Dayton Board's petition for a writ of certiorari on January 17, 1977.

The various opinions and orders below will be described in greater detail as they appear chronologically in the remainder of this Statement. Part B provides a summary overview of the Dayton school district. Parts C and D below then describe the facts adduced at the

November 1975 violation trial. (The facts relating to violation issues which have been reserved for decision by the court of appeals are summarized in Appendix A, attached hereto.) The remaining parts summarize the lower courts' opinions and orders, as well as the facts adduced at the remedial hearings which are pertinent to the disposition of the case in this Court.

B. The Dayton District

As reflected in the report (A.157-58) of the Master appointed by the district court, the city of Dayton, Ohio, has a population of 245,000 and is located in the east-central part of Montgomery County in the southwestern part of the state of Ohio, approximately 50 miles due north of Cincinnati. The Dayton school district is not coterminus with the city; some parts of the school district include portions of three surrounding townships and one village, while some portions of the city are included in the school districts of three adjacent townships. The total population residing within the Dayton school district boundaries is 268,000; the school pupil population in 45,000, slightly less than 50% of whom are black. Prior to implementation of the desegregation plan here at issue, the vast majority of black and white pupils had separately attended schools either virtually all-white or all-black in their pupil racial composition. *E.g.*, A. 49-51, 311-315 (PX 2A-2E), 502-506 (PX 100A-100E), 588-589 (DXCU).

The Dayton district is bisected on a north/south line by the Great Miami River. Historically, the black population has been concentrated in the south-central and southwest parts of the city, primarily on the west side of the Miami River and south of the east-west Wolf Creek. *See* A.577-79 (1940, 1950 and 1960 census

tract maps). The black population continues to be concentrated in the southwest quadrant, but there is now also a substantial black population in the northwest quadrant across Wolf Creek. Extreme northwest Dayton and most of the city east of the Miami River are and have been heavily white in residential racial composition. *See* A.580 (1970 census tract map).

Geographically and topographically there are no major obstacles to complete desegregation of the Dayton school district. A.121. The Master determined that where pupil transportation is necessary, the maximum travel time would be about twenty minutes. A.162. As found by the Board's experts, due to the compact nature of the system, "the relative closeness of the Dayton Schools makes long-haul transportation[,] an issue in many cities[,] moot here." A.304. Thus, there is no issue whether the time or distance of transportation is here excessive or otherwise poses any threat to the health or education of pupils.

C. The Pre-*Brown* Dual System

In 1887 the state of Ohio repealed its school segregation law and attempted to legislate the abolition of separate schools for white and black children. 85 Ohio Laws 34. That statute was sustained the following year by the Supreme Court of Ohio. *Board of Education* v. *State*, 45 Ohio St. 555, 16 N.E. 373 (1888). The laudable goals of that legislation were not attained in Dayton until the current school year.

The facts of racial segregation in the Dayton public schools, as revealed by the record before the Court, begin in 1912.[3] In that year school authorities assigned

[3] Many of the facts set forth in this part of the statement were admitted by all Dayton Board defendants in their responses to

Louise Troy, a black teacher, to a class of all-black pupils just inside the rear door of the Garfield school; all other classes in this brick building were occupied by white pupils and white teachers. About five years later, four black teachers and all of the black pupils at Garfield were assigned to a four-room frame house located in the back of the brick Garfield school building with its all-white classes. Shortly thereafter, a two-room portable was added to the black "annex" making six black classrooms and six black teachers located in the shadow of the white Garfield school. A four-room "permanent" structure was later substituted (about 1921 or 1922), and eight black teachers were thus assigned to the eight all-black classrooms in the Garfield annex. A.209-11.[4]

About 1925 school authorities learned that two black children, Robert Reese and his sister, had been at-

plaintiffs' pre-trial Requests for Admissions, served on October 13, 1972. The Superintendent and three Board members filed responses separate from those of the Board and its four "majority" members. These facts were also the subject of extensive and largely uncontroverted evidence at trial.

[4] In 1917 the black classes in the black annex at Garfield contained about 50 black children per room. A.210. Thereafter, Mrs. Ella Lowrey, a black teacher for several decades in the Dayton system, taught a class of 42 black children when white teachers inside the brick building had classes of only 20 white pupils. A.211.

Mrs. Lowrey's service began in 1916 and continued through 1963, with several years' interruption at various times. In her words, "doing 40 years service in all in Dayton, . . . I never taught a white child in all that time. I was always in black schools, black children, with black teachers." A.215. (At one time during this early history prior to 1931, one black teacher, Maude Walker, taught an ungraded class of all-black boys at the Weaver school. All other black teachers in the system were assigned to the black annex at Garfield. A. 186.)

tending the Central school under a false address, even though they lived near the Garfield school. They had accomplished this subterfuge by walking across a bridge over the Miami River River. A.197.[5] The Reese children were ordered by school authorities to return to the Garfield school, but their father refused to send them to the black Garfield annex. Instead, he filed a lawsuit in state court seeking a writ of mandamus to compel Dayton school authorities to admit children of the Negro race to public schools on equal terms with white children. A. 198. In a decision entered of record on December 24, 1925, the Court of Appeals of Ohio denied a demurrer to the mandamus petition. This decision was affirmed by the Ohio Supreme Court and

[5] During this time, there apparently were some other black children also in "mixed" schools. For example, Mrs. Phyllis Greer attended "mixed" classes at Roosevelt high school for three years prior to 1933. A.182. But even when they were allowed to attend so-called "mixed" schools, black children were subjected to humiliating discriminatory experiences within school. At Roosevelt, for example, black children were not allowed to go into the swimming pool and blacks had separate showers while Mrs. Greer was there (A. 183-83); while Robert Reese was at Roosevelt, there were racially separate locker rooms and blacks were allowed to use the swimming pool, but not on the same day whites used it A.198-99. At Steele High School, black children were not allowed to use the pool at all during this period. A.290-91.

Even in the "mixed" classrooms black children could not escape the official determination that they were inferior beings because of the color of their skin. Mrs. Greer vividly remembers, for example, "when I went to an eighth grade social studies class I was told by a teacher, whose name I still remember, . . . that even though I was a good student I was not to sit in front of the class because most of the colored kids sat in the back." A.183. And she remembers with equal clarity that, while in the second grade at Weaver, she "tried out for a Christmas play and my teacher wanted me to take the part of an angel and the teacher who was in charge of the play indicated that I could not be an angel . . . because there were no colored angels." R.I.479.

Dayton school authorities were specifically reminded that state law prohibited distinctions in public schooling on the basis of race. *Board of Education of School District of City of Dayton* v. *State ex rel. Reese,* 114 Ohio St. 188, 151 N.E. 39 (1926).

Following this state court decision Robert Reese and a few of his black classmates were allowed to attend school in the brick Garfield building, but the black annex and the white brick building were otherwise maintained. Black children were allowed to attend classes in the brick building only if they asserted themselves and specifically so requested. A.212-13. Otherwise, they "were assigned to the black teachers in the black annex and the black classes." A.213.[6]

The black pupil population continued to grow at Garfield, and another black teacher was hired and assigned with an all-black class placed at the rear door of the brick building. A.213. In 1932 or 1933, Mrs. Lowrey (*see* note 4, *supra*), was also placed in the brick building, again with an all-black class "in a little cubbyhole upstairs," making ten black teachers with ten black classes at Garfield. A.214. Finally, around 1935-36, after most of the white children had transferred out of Garfield, school authorities transferred all the remaining white teachers and pupils in the brick building to other schools and assigned an all-

[6] During the pendency of the Reese case, the eight black teachers assigned to the Garfield annex were employed on a day-to-day basis because school authorities did not know whether the black teachers were going to be in the Dayton system after the lawsuit. Black teachers would not be needed if the courts required the elimination of all-black classes, since the Board deemed black teachers unfit to teach white children under any circumstances. A.211-12.

black faculty and student body to Garfield. A.186-187, 214-15, 524 (PX 150 I); PX 155 (faculty directories).[7]

But the black pupil population was growing during these years, and even the conversion of Garfield into a blacks-only school was not sufficient to accommodate the growth. So, with the state court decision in the Reese case now eight years old, the Dayton Board converted the Willard school into a black school. The conversion process was as degrading and stigmatizing as had been the creation and maintenance of the Garfield annex and the ultimate conversion of the brick Garfield into a black school. In the 1934-35 school year, six black teachers (who were only allowed to teach black pupils) and ten white teachers had been assigned to the Willard school. In September of 1935, all white teachers and pupils were transferred to other schools, and Willard became another school for black teachers and black pupils only. A.186-87, 524 (PX 150 I); PX 155 (faculty directors).

At about this same time, the new Dunbar school, with grades 7-9, opened with an all-black staff and an all-black student body. A.524 (PX 150 I).[8] The Board

[7] Throughout this period and until 1954, black children from a mixed orphanage, Shawn Acres, were assigned across town to the black classes in the black Garfield school, while the white orphan children were assigned to nearby white classes and white schools. A.181-82. This practice was terminated following the *Brown* decision in 1954 at a time when the black community in Dayton was putting pressure on the school administration to stop mistreating black children. A.483 (PX 28).

[8] Mr. Lloyd Lewis, who was present at its inauguration, testified that the Dunbar school "was purposely put there to be all black the same as the one in Indianapolis [the Crispus Attucks school, *see United States* v. *Board of School Comm'rs*, 332 F. Supp. 655, 665 (S.D. Ind. 1971)] that I had left." R.I. 1378. Dunbar was

resolution opening Dunbar stated that grades 7 and 8 were to be discontinued at Willard and Garfield[9] and "that attendance at the . . . Dunbar School be optional for all junior high school students of the 7th, 8th, and 9th grade levels in the city." A.227, 539 (PX 161 A). Of course, this meant only all *black* junior high students, since Dunbar had an all-black staff who were not permitted by Board policy to teach white children. A.186, 228; PX 155 (faculty directors).

Within a very short time, grades ten, eleven and twelve were added to the black Dunbar school. Then in 1942, just two years after the Dayton school authorities had reorganized to a K-8, 9-12 grade structure, the Board again assigned the seventh grades from the all-black Willard and Garfield schools to the all-black Dunbar school. A.227, 520 (PX 161 B). Black children from both the far northwest and northeast sections of the school district traveled across town past many all-white schools to the Dunbar school. A.190; R.I. 1226-27. Many white children throughout the west side of Dayton were assigned to Roosevelt high school past or away from the closer but all-black Dunbar high school. *See* PX 47 (overlay of 1957 attendance boundaries).[10] Although some black children were allowed

also excluded from competition in the city athletic league until the late 1940's, thereby requiring Dunbar teams to travel long distances to compete with other black schools, even those located outside the state. A.183, 205-06; R.I.569-70.

[9] These two black elementary schools served grades 7 and 8, whereas the system prior to 1940 was otherwise generally organized on a K-6, 7-9, 10-12 grade-structure basis. R.I. 1871.

[10] Prior to 1940, no high schools had attendance boundaries. R.I.1886. The black Dunbar school was located in close proximity to the Roosevelt high school (*see* PX 47) which, although it always had space, apparently had too many black children. Along with

to attend Roosevelt, those who became "behavior problems" were transferred to Dunbar. A.184. And other black children from various elementary schools were either assigned, channeled, or encouraged to attend the black Dunbar high school. A.238-39, R.I. 574."

Even these segregative devices were not sufficient to contain the growing black pupil population. So between 1943 and 1945, the Board, by way of the same gross method utilized to convert the Willard school

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Steele and Stivers, these high schools were located roughly in the center of the city and served high school students throughout the city. (In addition, the Parker school had been a city-wide single-grade school which served ninth graders. R.I.1921-22; A.288-89.) In 1940 attendance boundaries were drawn for the high schools with the exception of Dunbar and a technical school (whose name varied), both of which long thereafter remained as city-wide schools. *See* note 22, *infra,* and accompanying text.

Dunbar continued until 1962 as a city-wide all-black high school. In that year the Dunbar building was converted into an elementary school (renamed McFarlane) with attendance boundaries drawn to take in most of the students previously attending the all-black Williard and Garfield schools, which were simultaneously closed. McFarlane opened with an all-black faculty and all-black pupil population. At the same time, a newly-constructed Dunbar high school opened with both asigned faculty and students over 90% black. A.315 (PX 2E), 316 (PX4), 508 (PX 130C), 248; PX3.

[11] The most effective means of forcing black children to attend the blacks-only Dunbar, of course, was the psychological one of branding them unsuited for association with white children. *See* note 5, *supra.* As Mr. Reese testified, he "chose" Dunbar over Roosevelt after suffering the humiliation of being assigned to separate locker rooms, separate showers, and separate swimming pools at Roosevelt: "I wanted to be free. I felt more at home at Dunbar than I did at Roosevelt . . . You couldn't segregate me at Dunbar." A.199. Similarily, Mrs. Greer testified: "I went to Dunbar because I felt that if there was going to be—if we were going to be separated by anything, we might as well be separated by an entire building as to be separated by practices." A.183.

into a black school, transformed the Wogaman school into a school officially designated unfit for whites. White pupils residing in the Wogaman attendance zone were transferred by bus to other schools, to which all-white staffs were assigned. By September 1945 the Board assigned a black principal and an all-black faculty with an all-black student population to the Wogaman school. A.183-84, 200, 524 (PX 150I); PX 155 faculty directories).

Still other official devices were used to keep blacks segregated in the public schools. One such device, resorted to regularly during the 1940's and early 1950's, was to cooperate with and supplement the discriminatory activities of Dayton public housing authorities. Throughout this period, racially-designated public housing projects were constructed and expanded in Dayton. A.178-79, 510 (PX 143 B). In 1942, the Board transferred the black students residing in the black DeSoto Bass public housing project to the Wogaman school (A.540 (PX 161 X)), and a later overflow to the all-black Willard school, rather than other schools that were equally close (A.185), while transferring white students from the white Parkside public housing project to the McGuffey and Webster schools and the eighth grades from those schools to the virtually all-white Kiser school. A.540. Then in the late 1940's and early 1950's, the Board leased space in white and black public housing projects for classroom purposes, and assigned students and teachers on a uniracial basis to the leased space so as to mirror the racial composition of the public housing projects. A.179-80, 513-23 (PX 143 J).

By the 1951-52 school year (the last year prior to 1964 for which enrollment data by race is available),

the Dayton Board was operating what southern educators would immediately recognize as a dual school system. During that year there were 35,000 pupils enrolled in the Dayton district, 19% of whom were black. There were four all-black schools, officially designated as such: Willard, Wogaman, Garfield and Dunbar. These schools had all-black faculties and (with one exception, an assignment made that school), *no* black teachers taught in any other schools. PX 3. In addition, there were 22 white schools with all-white faculties and all-white student bodies. And there was an additional set of 23 so-called "mixed" schools, 7 of which had less than 10 black pupils and only 11 of which had black pupil populations greater than 10% (ranging from 16% to 68%). A.506 (PX 100E). These latter schools were generally located in the area surrounding the location of the 4 designated all-black schools. These few schools with substantial racial mix, however, were marked by patterns of racially segregatory and discriminatory practices within the school, and, with the one exception noted above, none had any black teachers. Eighty-three percent of all white pupils attended schools that were 90% or more white in their pupil racial composition. Of the 6,628 black pupils in the system, 3,602 (or 54%) attended the four all-black schools with all-black staffs; and another 1,227 (or 19%) of the system's black pupils were assigned to the adjacent schools which were about to be converted into "black" schools (*see* note 12, *infra*, and accompanying text). Thus, 73% of all black students attended schools already or soon to be designated "black."

In December 1952 the Dayton Board confronted its last pre-*Brown* opportunity to correct the officially-imposed school segregation then extant. Instead, the

Board acted in a manner that literally cemented in the dual system and promised racially discriminatory public schooling for generations to come. What the Board did is referred to in the record as the West-Side Reorganization, and it involved a series of interlocking segregative maneuvers.

At this time, the Board was under pressure, as its record reflect, from "the resistance of some parents to sending their children to school in their district because it is an all negro [*sic*] school." A.499 (PX 75). In response, the Board constructed a new all-black school (Miami Chapel) located near the all-black Wogaman school and adjacent to the black De-Soto Bass public housing project; Miami Chapel opened in 1953 with an all-black student body and an 85% black faculty. A.316 (PX 4). The Board altered attendance boundaries so that some of the children in the four blacks-only schools were reassigned to the four surrounding schools with the next highest black pupil populations; and, through either attendance boundary alterations or the creation of optional zones, it reassigned white students from these mixed schools to the next ring of whiter schools. A.257-65, 283-84; PX 123.[12] And the Board began to assign black teach-

[12] The boundaries of the black Garfield and Wogamon schools were retracted, thereby assigning substantial numbers of black children to the immediately adjacent ring of "mixed" schools with the highest percentage of black pupils: Jackson (already 36% black in the 1951-52 school year), Weaver (68% black), Edison (43% black), and Irving (47% black). A.506 (PX 100E). Jackson and Edison were re-zoned to include more black students, and their outer boundaries were effectively contracted through the creation of "optional zones" so that white residential areas became attached, for all practical purposes, to the next adjacent ring of "whiter" schools. Thus, the Board brought blacks in one end and allowed whites to escape out the other in these "transi-

ers to these formally mixed schools, thereby confirming their identification as schools for blacks rather than whites. A.259-60; PX 3.

This latter aspect of state-imposed segregation—i.e., faculty assignments on a racial basis "pursuant to an explicit segregation policy of the Board" (A.56)—also underwent a slight change in school board policy. Prior to this time, as previously noted, the Board would not allow black teachers to teach white children under any circumstances; black teachers were assigned only to all-black schools, and white teachers were assigned only to white and "mixed" schools. Accordingly, in the 1951-52 school year, the Board substituted a new, but equally demeaning, faculty assignment policy (A.481 (PX 21)):

> The school administration will make every effort to introduce some white teachers in schools in negro [*sic*] areas that are now staffed by negroes [*sic*], but it will not attempt to force white teachers, against their will, into these positions.
>
> The administration will continue to introduce negro [*sic*] teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro [*sic*] teachers.

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tion" schools. The Board also created optional zones in white residential areas contained within the boundaries of the original four schools for blacks only, so that whites could continue to transfer out of these all-black schools. A.257-65. Prior to 1952 whites had been freely allowed to transfer to "whiter" schools, but such transfers were abolished in 1952. A.262, 482 (P X28). Optional zones were thus substituted for the prior segregatory transfer practice. (The optional-zone technique is discussed in greater detail at pages 24-30, *infra*.

This faculty policy, incredibly, was contained in a statement of the Superintendent disavowing the existence of segregated schools in the Dayton district.[13]

At the time of this Court's May 17, 1954 decision in *Brown* v. *Board of Education,* therefore, Dayton school officials were operating a racially dual system of public education. This segregation had not been imposed by state law; indeed, it was operated in open defiance of state law.

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[13] In 1954 the Superintendent made a further statement, which included the following: "All elementary schools have definite boundaries and children are obliged to attend the school which serves the area in which they reside. The policy of transfers from one school to another was abolished two years ago when the boundaries of several westside elementary schools were shrunken, permitting a larger number of Negro children to attend mixed schools." A.482 (PX 28). As we have seen (*see* note 12, *supra*), however, the elimination of free transfers was accompanied by a new device, optional zones, which served the same purpose of allowing whites to avoid attendance at black or substantially black schools.

The Superintendent's 1954 statement also contains the following (A.483):

> About two years ago we announced a policy of attempting to introduce white teachers in our schools having negro [sic] population. We have not been too successful in this regard and at the present time have only 8 full or part-time teachers in these situations. There is a reluctance on the part of white teachers to accept assignments in westside schools and up to the present time we have not attempted to use any pressure to force teachers to accept such assignments. The problem of introducing white teachers in negro [sic] schools is more difficult than the problem of introducing negro [sic] teachers into white situations. There are several all-white schools which in the near future will be ready to receive a negro [sic] teacher.

As we shall also show (*see* pages 20-24, *infra*), this race-based assignment of faculty continued for almost two more decades as a primary device for earmarking schools as intended for blacks or whites.

D. Continuation of the Dual System After *Brown*

Consideration of the Board's segregatory conduct following this Court's decision in *Brown* may be divided into six general areas: (1) faculty and staff assignments, (2) optional zones and attendance boundaries, (3) Board rescission of a Board-adopted plan of desegregation, (4) school construction, closing and site selection, (5) grade structure reorganization, and (6) pupil transfers and transportation. We summarize *seriatim* the facts relating to the first three areas. The facts pertaining to the latter three areas, and their legal significance, have been contested by the Board, and the court of appeals has reserved decision with respect to these practices. Since in our view disposition of this issue is not essential to affirmance of the judgment below, we have summarized the facts relating to these latter three areas in Appendix A, attached hereto.[14]

1. *Faculty and Staff Assignments*

The Board continued to make faculty and staff assignments in accordance with the racially discriminatory policy announced in 1951 (*see* page 18, *supra*)

[14] One of the three areas discussed in this part of the Statement—faculty and staff assignments—was discussed by the court of appeals in *Brinkman I* in part IV of its opinion, entitled "Other Alleged Constitutional Violations," on which the court reserved decision. A.56-67. But "Staff Assignment" (A.56-61) is included in that part of the opinion only because of plaintiffs' contention, implicitly rejected by the district court (*see* page 37, *infra*), that staff assignments at the time of trial continued to be made on a racially discriminatory basis. It is clear from the court of appeals' unqualified determination of the pre-1971 facts pertaining to staff assignments that the appellate court did not consider these practices to be the subject of dispute or of adverse district court findings. *See* note 47, *infra*.

at least through the 1970-71 school year. For example, in the 1968-69 school year, the Board assigned 633 (85%) of the black teachers in the Dayton system to schools 90% or more black in their pupil racial compositions, but only 172 (9%) of the white teachers to such schools. The Board assigned only 72 (9%) of the black teachers to schools which were 90% or more white, but 1,299 (70%) of the white teachers were assigned to such schools. A.320 (PX 5D).

Prior to the 1968-69 school year, the Board maintained teacher applications on a racially separate basis. Once teachers were hired, their records were kept on various racial bases which were used to segregate teachers and schools. Substitute teacher files were color-coded by race and substitutes assigned on a racially dual basis. And the Board restricted the hiring, transfer, and promotion of black teachers primarily to black or "changing" schools while white assignments or transfers to these schools were discouraged. A.191-95, 201, 204-05, 187-91; PX 3; R.I. 673-88, 536-542, 731-35, 742,50, 762-69. Principals, assistant principals, counselors, coaches and other clerical and classified personnel were assigned on an even more strictly segregated basis. A.486 (PX 42), 234, 191-93. Thus, from at least 1912 through 1968 the assignment of personnel in the Dayton school system fit perfectly the classical mold of state-imposed segregation: such assignments mirrored the racial composition of student bodies at new schools and additions,[15] and continued to correspond to the racial identity of

[15] The Board assigned faculty members to these new schools and additions so as to reflect the pupil racial composition at opening, thereby tailoring them as "black" or "white" in accordance with the Board's policy. A.316-17 (PX 4), 275; R.I.1860.

those schools already all-black or in transition.[16] White teachers similarly were assigned in disproportionate numbers to the predominantly white schools.[17] It was therefore possible at anytime during this period to identify a "black" school or a "white" school anywhere in the Dayton system without reference to the racial composition of pupils.

In November of 1968 the United States Department of Health, Education and Welfare [hereinafter, "HEW"] began an investigation of the Dayton public schools to determine whether official policies and prac-

[16] In the 1963-64 school year, for example, the Board assigned 40 of 43 new full-time black teachers to schools more than 80% black in their racial compositions. A.319 (PX 5A). Although somewhat less obvious, this practice was equally effective in identifying the formerly mixed schools as changing or black by assigning more than token black faculty only to these schools and thereafter assigning increasing numbers of black teachers only to these schools. PX 3; A.195-97, 224. As articulated by Mrs. Greer, a long-time black student, teacher and administrator in the system (*see* note 5, *supra*), the "assignment of staff to go along with the neighborhood change was the kind of thing that gave the impression of the schools being designed to be black, because black staff increased as black student bodies increased." A.191.

[17] Thus, for example, in the 1968-69 school year, the Board continued to assign new teachers and transfers according to the following segregation practice (A.319 (PX 5A)):

	Schools with predominantly white student enrollment	*Schools with predominantly black student enrollment*
Black Teachers	40	95
White Teachers	223	64

As the Superintendent testified, "it is obvious in terms of the new hires and transfers for that year the predominating pattern was the assignment of black teachers to black schools and white teachers to white schools." A.233.

tices with respect to race were in compliance with Title VI of the Civil Rights Act of 1964. By letter of March 17, 1969, the Acting Director for the Office of Civil Rights of HEW notified the Dayton Superintendent (and the chief state school officer) that "[a]n analysis of the data obtained during the [compliance] review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff." A.415 (PX 11A). Following this determination the Dayton Board agreed with HEW to desegregate all staff so "that each school staff throughout the district will have a racial composition that reflects the total staff of the district as a whole" (A.416 (PX 11F)), in accordance with the principles set forth in this Court's decision in *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). At that time, the Dayton professional staff was approximately 70% white and 30% black; the Board-HEW agreement required complete staff desegregation by September 1971. A.417. Nevertheless, by the time of trial in November 1972, it was still possible to identify many schools as "black schools" or "white schools" solely by the racial pattern of staff assignments.[18]

No non-racial explanation for the Board's long history of assigning faculty and staff on a racial basis is possible.[19] Nor can the impact of this manifestation of

[18] The manner in which the Board's assignment of its professional staff at the high school level, for example, still served to racially identify schools, athough considerably less dramatically than prior to the 1971-72 school year, is demonstrated by a table set out by the court of appeals in *Brinkman I*. A.57. Moreover, classified personnel (e.g., secretaries, clerks, custodians and cafeteria workers) continued to be assigned on a racially segregated basis. A.234.

[19] School officials, of course, had absolute control over the place-

state-imposed segregation on student assignment patterns by minimized. While that effect is not precisely measurable, it is so profound that it could not have been eliminated merely by desegregating faculties and staffs.[20]

2. *Optional Zones and Attendance Boundaries*

We have already shown how the Dayton Board utilized optional zones and attendance boundary manipulation as segregative devices in connection with the 1952 West-Side Reorganization (*see* pages 16-18, *supra*). There are additional examples of both practices which stand on their own as segregation techniques.

Optional zones are dual or overlapping zones which allow a child, in theory, a choice of attendance between two or more schools. A.241. Yet, the criteria stated by the Board for the creation of both attendance boundaries and optional zones are precisely the same: they constitute merely a type of boundary decision and

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ment of their employees. Consequently, the Board's historic race-oriented assignments of faculty members intentionally earmarked schools as "black" or "white." A.274.

[20] Dr. Robert L. Green, Dean of the Urban College and Professor of Educational Psychology at Michigan State University, described how such faculty-assignment practice "facilitates the pattern of segregation" (A.197) in these terms (A.195):

> When there has been historical practice of placing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentially uni-racial or predominantly black or predominantly white.

See also A.274-75.

serve no other educational or administrative purpose. A.238, 279. Optional zones have existed throughout the Dayton school district and have apparently been created whenever the Board is under community pressure which favors attendance at a particular school or disfavors attendance at a particular school. A.254; R.I. 1818-19. Other than for such purely "political" reasons, there is no rationale which supports the establishment of an optional zone rather than the creation of an attendance boundary, which is a more predictable pupil-assignment device (A.280); and optional zones are at odds with the so-called "neighborhood school concept." A.12-13.

In many instances in Dayton optional zones were created for clear racial reasons, as, for example, in the West-Side Reorganization, while in other instances the record reveals no known reason for their existence. But even in these latter instances some optional zones have had clear segregative effects. From 1950 to the time of trial, optional zones existed, at one time or another, between pairs of schools of substantially disproportionate racial compositions in some fifteen instances directly effecting segregation at some 30 schools.[21] In addition, at the high school level, Dunbar remained in effect a city-wide optional zone for blacks

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[23] The West Side Reorganization in 1952-53 (*see* pages 16-18, *supra*) involved six optional areas with racial implications: Willard-Irving, Jackson-Westwood, Willard-Whittier, Miami Chapel-Whittier, Wogamon-Highview, and Edison-Jefferson. A.252-53, 257-65; *see also* note 12, *supra*. Other optional zones with demonstrable racial significance at some time during their existence include the following: Three optional zones between Roosevelt and the combination Fairview-White; two optional zones between Residence Park and Adams; and optional zones between Westwood and Gardendale, Colonel White and Kiser, Fairview and Roth, Irving and Emerson, Jefferson and Brown, and Jefferson and Cornell Heights. A.250, 253-54, 255, 268-69, 279-83; PX 47-51.

only through 1962 when it was converted into an all-black elementary school (A.248, 269-71) (*see* note 10, *supra*); and Patterson Co-Op remained a city-wide and, through the 1967 school year, virtually all-white optional attendance zone.[22] In conjunction with the attendance-area high schools, these two special high schools operated as city-wide dual overlapping zones contributing to the pattern of racially dual schools at the high school level throughout the district. *See* R.I. 1518-21, 1483-84.

Actual statistics on the choices made by parents and children in four optional areas are available. In each instance the option operated in the past, and in three instances at the time of trial, to allow whites to transfer to a "whiter" school. For example, in the Roosevelt-Colonel White optional area, which was carved out of Roosevelt originally, from the 1959-60 school year through the 1963-64 school year a cumulative total of 1,134 white but only 21 black students attended Colonel White. A.464 (PX 15A1). Testimony from a Dayton school administrator indicates that from 1957 through 1961, although this optional area was predominantly white, black students who lived in the area attended Roosevelt which had become virtually all-black (Colonel White was 1% black). A.221-22.

[22] The city-wide Patterson Co-op operated in a more subtle segregative fashion than did Dunbar. In 1951-52, Patterson had no black students and no black teachers (A.507 (PX 130B)); by 1963 its student body and faculty were only 2% black (A.508 (PX 130C)); and by 1968 the pupil population rose to 18.3% black and the faculty to 3.5% black. A.509 (PX 130D). Students were admitted to Patterson through a special process involving coordinators and counselors, none of whom were black prior to 1968. A.286-88. Patterson has over the years served as an escape school for white students residing in black or "changing" attendance zones, particularly Roth and Roosevelt. R.I. 1483-84.

The Roosevelt yearbook for 1962 shows that only three white seniors from the optional area attended the black high school. A.462 (PX 15A). As Mrs. Greer testified, this optional area did "an excellent job of siphoning off white students that were at Roosevelt." A.190.[23]

Although many of these still-existing optional zones had already fulfilled their segregative purpose by the time of trial, over time they clearly contributed substantially to and facilitated school segregation. Moreover, even by the time of trial several of these optional areas continued to permit whites to escape to "whiter" schools, thereby further impacting the black schools and precipitating additional instability and transition in residential areas.[24]

[23] As another example, the Colonel White-Kiser option acquired its racial implications after its creation in 1962 with the racial transition of the Colonel White school, to which the Colonel White-Roosevelt option contributed in no small measure. At its inception and for several years thereafter, when both schools were virtually all-white, most children in the White-Kiser option area chose White. As Colonel White began to acquire more black students, whites chose Kiser more often until in the 1971-72 school year, no white children chose the 46% black Colonel White school, while 20 chose the 6% black Kiser school. A.465 (PX 15B1), 554.

The rebuttal figures provided by the defendants on the Residence Park-Jackson optional area are equally instructive, because the figures relate to a time when the optional area did not even exist by reason of the construction of the virtually all-black Carlson school and its assumption of the old Veterans Administration optional area as its regular attendance zone. A.586, 587. In any event, defendants' exhibit shows that from 1957 through 1963 no children from the former V.A. optional area attended Jackson, while 32 whites (and 8 blacks) attended Residence Park. In the 1957-58 school year, Residence Park was basically white and Jackson was black. A.250-51; R.I. 377. (By 1961, however, Residence Park had become 80% black. A.508 (PX 130C).)

[24] From 1968 through 1971, when Roosevelt was a 100% black

Formal attendance boundaries, in conjunction with optional zones, have also operated in a segregative fashion; and in some instances firm boundaries were also drawn along racial lines.[25] An example is the boundary separating Roth and Roosevelt which was drawn in 1959. Roth took almost all the white residential areas on the far west side of Dayton from Roosevelt. At its opening, Roth had only 662 pupils, while Roosevelt's enrollment dropped by 602. Coupled with the exodus of whites out of Roosevelt through the Colonel White-Roosevelt optional area, almost all whites were thereby transferred out of Roosevelt by

school, for example, 375 white children from Roosevelt-Colonel White optional area attended Colonel White. A.464. Throughout its life, then, this option has allowed very substantial numbers of white children to avoid attending Roosevelt. By 1968, however, and not atypically, the optional area had undergone significant racial change and substantial numbers of black children were also attending Colonel White. A.462-64. Plaintiffs' expert, Dr. Foster, explained how optional attendance areas facilitate both educational and racial segregation:

> [T]he short term effect . . . is to allow whites to move out of a school assignment that is becoming black . . . [A.255].
>
> [G]enerally where you have an optional zone which has racial implications, you have an unstable situation that everyone realizes is in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation . . . [T]hese [optional areas in Dayton] accelerated and precipitated further segregation . . . [A.254-55].

[25] In some instances, and in addition to the official optional zones, attendance boundaries have not been enforced for white children when assigned to black schools. For example, a pupil locator map made to assist in developing a middle school plan in the 1970-71 school year showed that many white children assigned by their attendance zone to the predominantly black Greene school were actually attending predominantly white schools located on the other side of Wolf Creek. R.I.1210-11. A similar situation existed in the Carlson area. *See* note 23, *supra*.

Board action, in short order converting Roosevelt into a virtually all-black school. A.268-69; PX 48 & 46. (And, of course, the designation of Roosevelt as a black school was evidenced, in the traditional way, by assigning ever-increasing numbers of black teachers to the school. PX 3.)

At about this same time, Meadowdale high school also opened, but as a virtually all-white school. A.317 (PX 4). Opportunities were available for the placement of such high schools and use of the excess capacity or the redrawing of the boundaries of Roth, Roosevelt, Stivers, Fairview and Meadowdale in order to accomplish desegregation. But school authorities selected the alternatives that continued rather than alleviated the extreme racial segregation at the high school level. R.I. 1696-1700; PX 6; A.249, 268-69. This pattern was capped in 1962 when a new Dunbar high school opened with a virtually all-black faculty and a defined attendance zone that produced a virtually all-black student body. At the same time the Board converted the old Dunbar high school building into an elementary school (renamed McFarlane), whose newly-created attendance zone took in most of the students in the zones for the all-black Williard and Garfield schools, which were closed. *See* note 10, *supra*.

Finally, the Board also persistently refused to redraw boundaries between, or pair, contiguous sets of schools which had been, and were at the time of trial, substantially disproportionate in their racial compositions. Examples of such contiguous pairs include Drexel (8% black) and Jane Adams (79% black); McGuffey (42% black) and Webster (1% black) or Allen (1 %black); Irving (99% black) and Emerson (9% black); Whittier (99% black) and Patterson

(0% black). PX 68, 62. Such alternatives to segregation—many of which were recommended by subordinate school administrators and even the Ohio State Department of Education (A.204-05, 419-55 (PX 12)) —were rejected by the Board.

3. *The Board's Recission of Its Affirmative Duty*

As reflected in the foregoing pages, black citizens of Dayton have been thwarted in their attempts to end state-imposed racial segregation in their public schools. Even aggressive action, such as that taken by Robert Reese's father when he went to court in 1926 to challenge intentional efforts to segregate his children, was effectively blunted by Dayton school authorities committed to separation of the races. *See* pages 9-12, *supra*. During another critical period, 1951-52, the Board imposed the West-Side reorganization and a new racially discriminatory faculty-assignment policy. *See* pages 16-19, *supra*. The black community's repeated protests following *Brown* to the continued segregation also were turned aside. *See* A.358-59, 456-57, 459-61. By the late 1960's, however, those who objected to state-imposed school segregation began to gain allies, both in the white community in Dayton and among state and federal agencies. As previously noted (*see* pages 22-23, *supra*), HEW conducted a Title VI compliance review in 1968 and forced the Board in 1969 to agree to end its racially dual faculty-assignment practices. HEW had also noted the "substantial duality in terms of race or color with respect to distribution of pupils in the various schools . . ." (A.415), but the agency did not pursue this concern with similarly aggressive action.[26]

[26] As is commonly known, from the frequent judicial declarations on the subject, HEW has generally failed to fulfill its Title VI obligations with respect to pupil desegregation in both the North and the South. *See, e.g., Adams* v. *Richardson*, 480 F.2d 1159 (D.C.Cir. 1973) (*en banc*); *Brown* v. *Weinberger*, 417 F. Supp. 1215 (D.D.C. 1976). And it has not been notably aggressive even with respect to faculty segregation. *See Kelsey* v. *Weinberger*, 498 F.2d 701 (D.C.Cir. 1974).

Also during these years, the Dayton Board, in the 1971 words of the State Department of Education, "passed various and sundry resolutions . . . designed to equalize and to extend educational opportunities, to reduce racial isolation, and to establish quality integrated education in the schools." A.423. But these were just words and informal ones at that. As the State Assistant Superintendent for Urban Education noted at the same time, there was a definite need for action and not just words. A.422.

On April 29, 1971, the Board requested assistance from the State Department of Education's Office of Equal Educational Opportunities to provide technical assistance in the development of alternative desegregation plans. The Board also authorized its President to appoint a committee of community representatives to assist and advise the Board in connection with such proposed plans. A.354-55.

The State Department of Education responded by assembling a team of consultants and specialists to evaluate data and make recommendations. Their recommendations were submitted to the Dayton Superintendent on June 7, 1971. A.419-55. The State Department advised the Dayton Board of its constitutional and other legal obligations (A.435) (emphasis in original):

> Since the Board, *as an agency of state government,* has created the inequality which offends

> the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative duty to comply with the Constitution; that is, as the Supreme Court has stated, "to eliminate from the public schools all vestiges of state-imposed segregation."

The State Department then turned its attention to a list of alternatives, and urged the Dayton Board to shoulder its constitutional obligations *now* (A.441) (emphasis in original):

> *Delaying tactics could be continued.* The Board, in spite of resolutions and overt commitment, could choose to make only the slightest mandated changes, and to utilize the best legal talent available to resist compliance with constitutional requirements. Other school districts have chosen this alternative, even as Dayton has used similar methods in the past. However, the highest court in the land has stated the constitutional offensiveness of state-imposed segregation of school-children, and persisting delay clearly violates the oath of office of members of the Board of Education in the state of Ohio.

The State Department concluded by recommending "a comprehensive plan" that would be a "constitutionally valid and inoffensive, educationally sound, and morally proper" approach for "the Dayton Board of Education, acting as an agency of Ohio State Government . . ." to take. A.444.[27]

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[27] Under the terms of Opinion No. 6810, issued by the Ohio Attorney General on July 9, 1956, the State Department of Education has the primary affirmative duty to see that local school districts comply with their Fourteenth Amendment obligations with respect to public schooling. A.597-606.

The Board-appointed advisory committee of community representatives became known as the "Committee of 75." In his charge to the Committee, the Dayton Board President stated: "We have admitted that the district is guilty of procedures which have led to the racial isolation of school children." A.356. The Committee issued its report in the fall of 1971. The Report of the Committee of 75 (A.345-69) also urged the Board to adopt a comprehensive plan and joined the State Department in emphasizing "that time for a change in Dayton has run out! We must act now." A.369.

On December 8, 1971 the Dayton Board of Education, for the first time ever, responded with meaningful action. It first "recognize[d] and admit[ted] that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor Boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs . . . ." A.321. The Board then adopted a program of actual system-wide desegregation and directed the Superintendent to implement such a new pupil-assignment policy for the 1972-73 school year. The new policy consisted of two principal parts: first, the existing attendance zones and the Freedom of Enrollment policy[28] were abrogated effec-

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[28] The Board's Freedom of Enrollment policy was adopted in 1969. A.466-67. It had a very negligible, one-day desegregative effect (i.e., a few black students transferring to white schools), but white students did not transfer to black schools. A.478 (PX 16D). As the Superintendent testified, "the pattern . . . has been perva-

tive September 1, 1972; second, in their stead, a new pupil-assignment policy was adopted, the goal of which was that no school would have a racial composition "substantially disproportionate to the district as a whole." A.329. Pursuant to the Board's directions, the Superintendent of Schools adopted a plan for Fall 1972 implementation prepared by Dr. Gordon Foster and others of the Title IV Florida School Desegregation Consulting Center of the University of Miami. A.370-414.

On January 3, 1972, however, a newly-constituted Dayton Board[29] rescinded the prior Board's action of December 8, 1971, refused to consider the plan adopted by the Superintendent, reinstated the Freedom of Enrollment policy and reimposed the segregated attendance zones. A.331-53.[30] Plaintiffs instituted this action on April 17, 1972, and the case went to trial in November 1972.

At that time, the Dayton school district was segregated by race, as it always had been. In the 1971-72 school year (when the complaint was filed), there were

sive down through the years, that no white students, regardless of from where they came, or the purpose,, were assigned to black schools." A.232.

[29] Three new members of the seven-member Board had been elected the previous November to take office in January.

[30] By its actions, the new Board made it clear to the Superintendent that he would not be permitted to exercise his independent authority over the assignment of pupils (*see* OHIO REV. CODE § 3319.01) to implement the desegregation plan. R.I. 1096. The statute just cited vests the local Superintendent of Schools with the responsibility to "assign the pupils of the schools under his supervision to the proper schools and grades," except with respect to the assignment of pupils to schools outside their school districts of residence, where board approval is necessary.

69 schools in the Dayton district; 49 of them had student enrollments 90% or more one race (21 black, 28 white). Of the 54,000 pupils enrolled, 42.7% were black; 75.9% of all black students were assigned to the 21 black schools. A.314 (PX2D).[31] Thus, although the system was larger, it was basically the same dual system that existed at the time of *Brown* (*see* page 15-16, *supra*).[32]

Every school which was 90% or more black in 1951-52 *or* 1963-64 *or* 1971-72, and which was still in use at the time of trial (1972-74 school year) remained 90% or more black. Of the 25 white schools in 1972-73 (*see* note 31, *supra*), all opened 90% or more white and, if open, were 90% or more white in 1971-72, 1963-64, and 1951-52. A.315 (PX 2E). *See also Brinkman I*, A.50-51.

E. The District Court's Decision and Supplemental Order on Remedy

On February 7, 1973, the district court entered its Findings of Fact and Memorandum Opinion of Law. A.1-14. The district court dealt with the parties' contentions and the evidence in a cursory fashion. It made

[31] In 1972-73 there were 68 schools, of which 47 were virtually one-race (22 black, 25 white). Fully 80% of all classrooms were virtually one-race. (Of the 50,000 pupils in the district that year, 44.6% were black). A.311 (PX 2A).

[32] It was also the same one that existed in the 1963-64 school year (the first year after *Brown* for which racial data is available). In that year there were 64 schools in the Dayton system, of which 57 had student enrollments 90% or more one race (13 black, 44 white). Of the 57,400 pupils in the district that year, 27.8% were black. Yet 79.2% of all the black pupils were enrolled in the 13 black schools; and 88.8% of all pupils were enrolled in the 13 black schools; and 88.8% of all pupils were enrolled in such one-race schools. A.313 (PX 2C).

few specific findings of subsidiary fact, devoting most of its attention to surprisingly general and imprecise ultimate findings and conclusions. And it never shifted the burden of proof from plaintiffs despite the prior history of segregation.

With respect to the extensive and largely uncontroverted proof of pre-*Brown* racial discrimination, the court noted the "isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system." A.2. The court concluded (A.3):

> While arguably consistent with the social mores of the times, the treatment of black children during this period was at least inhumane and by present standards, reprehensible. . . . Both by reason of the substantial time that has elapsed and because these practices have ceased, however, the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy.

With respect to the Dunbar high school, the court found that it "was intended to be, and did in fact become, a black high school, with an all black teacher and pupil population . . . . [that] continued to exist as a city-wide all-black high school until it closed in 1962." A.4-5. Except to note the black Garfield annex in the 1920's the court made no findings with respect to the other black schools or the Board practices with respect to public housing projects. The court also ignored the West-Side Reorganization (except to note that the Westwood-Jackson optional zone had "racial significance at the time of its creation." A.8). No findings were made concerning the 1962 conversion of Dunbar into the all-black McFarlane elementary serving the former all-black Willard and Garfield attend-

ance areas and the opening of a new Dunbar high school with a virtually all-black faculty and student body.

With respect to faculty and staff, the court found that the Board's intentionally segregative assignment policies and practices could not "be dismissed on a *deminimus* theory." A.3. The court found, however, that "[b]y 1969 each school in the Dayton system had an integrated teaching staff consisting of at least one black faculty member," and that faculty were thereafter "substantially integrated" pursuant to the Board's agreement with HEW. A.4. The district court further found that the Board's employment of blacks in certain "positions such as skilled craftsmen . . . remains substantially below the percentage of black students population or the percentage of black teachers and administrators." A.4.

As to the pattern of one-race schooling at the time of trial, the court found that the "great majority of all schools" in Dayton are "racially imbalanced, consistent with the black-white population and geographical distribution thereof as shown by the 1970 census." A.5.[33] With the exception of recent affirmative efforts

[33] The court apparently uses the terms "racial imbalance" and "racial balance" to mean, respectively, segregated and not segregated. In the "racial imbalance" part of its opinion, the court directs the reader's attention to attached Appendix A, which lists each Dayton school and its 1971-72 racial composition. The court summarizes the elementary school situation in these words: "Of 52 elementary schools in use as of September, 1972, 29 are more than 90% white and 15 are more than 90% black. The balance range from 19.4% to 60.2% black." A.15. It seems fairly clear that the judge is referring to the 90%-plus one-race schools when he says that the "great majority . . . are racially imbalanced." A.5. And it is completely clear that the court does not equate "racial balance" with the system-wide black/white ratio, for no school

to desegregate Patterson Co-Op high school, "no effort has been made by the school board of Dayton to balance by race the student population at any particular school." A.5.

The court generally found the Board's practices concerning school construction and site selection, attendance boundaries and grade structure reorganization, and transfers to be "rational . . . and within the sound discretion of the Board" (A.5.), "neither segregative nor integrative" (A.6), "neutral" (A.7), or not "unfairly operated." A.9. Conceding that the Board could have exercised its discretion differently to choose among available alternatives which might have integrated the schools (A.7), the court nonetheless found that "plaintiffs have failed in their burden of showing that the defendant board exercised these options in an improper fashion." A.7. The court also found: (1) unspecified "errors in board planning" apparently intensifying school segregation (A.7); (2) a pattern of construction of new elementary schools and additions in "white neighborhoods" and "black neighborhoods" which opened and remain "predominantly" one-race (*id*); (3) the construction and location of new high schools "which followed the pattern of construction of elementary schools in that sites were selected away from the center of the city" in one-race areas (A.7); (4) a January 4, 1971 reorganization of middle schools having "neither segregative nor integrative effect" (A.6); and (5) a "free transfer" program which failed even to "reduce somewhat

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has a pupil population correlating with that figure (which is about 43% black for the 1971-72 year). If "racial balance" meant that, the court would have said *every* school (rather than just the "great majority") is "racially imbalanced."

racial imbalance and remove community perception of 'black' and 'white' schools." A.9. (*See* Appendix A, attached here, for a summary of the evidence with respect to these practices.)

With respect to optional zones, the court discussed the record with similar imprecision, but found, on balance, that plaintiffs had met the burden of proof imposed by the court. The court found that "many [optional zones] were created for the convenience of parents. There has been evidence that at times this last concept embraced desires motivated by racial considerations." A.8. "[R]acial significance" was attached to the creation of Westwood-Jackson, Roosevelt-Colonel White, and Fairview-Roth. *Id.* Without otherwise making findings as to the role of optional zones over time, the court found 11 current zones (7 at the elementary and 4 at the high school level). Although the elementary optional zones do not "today have any significant potential effects in terms of increased racial separation, the same cannot be said of the high school optional zones." *Id.*

With respect to the 1972 Board's rescission of the 1971 Board's desegregation program, the court rejected a "parliamentary rules" argument by the Board and concluded that the 1972 Board's action "was not in the nature of a reconsideration but instead was a rescission of the previous action." A.11. As such, it "constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton." *Id.*

Turning to the developing law applicable to challenges to non-statutory racial segregation, the court conceded its confusion and spoke of this case as "a

square peg for the round holes" of southern cases and "a round peg for the square holes of" northern cases. A.11-12. The court concluded (A.12):

> What we have found are racially imbalanced schools, optional attendance zones, and recent Board action, which are cumulatively in violation of the Equal Protection Clause. We hold that the totality of these findings require intervention by this Court under the mandate of *Brown* v. *Board of Education* . . . .

The court further noted that optional attendance zones are totally inconsistent with "the neighborhood school concept." A.12-13.

"Without seeking to calibrate the degree of segregation that inheres in individual policies of the Board," the court directed the Board to submit a plan which would (1) abolish all presently remaining optional attendance zones, (2) restate the Freedom of Enrollment policy so that "no student of a minority race may be denied attendance at any high school in the Dayton Public School System and so that transfers for purpose of improving racial balance take precedence over curriculum transfers," (3) "[m]aintain faculty assignment policies that will reflect in each school the approximate ratio of black to white faculty throughout the district," and (4) "[e]stablish hiring policies that will enable the clerical and maintenance personnel hired by the school board of Dayton to approximate the proportion of black-to-white ratio of the Dayton School District." A.13 These four specific criteria were deemed "minimum" aspects of the plan which, in addition, "shall in all other respects conform to the requirements of law. *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971); *Davis* v. *Board of School Commissioners of Mobile County, Ala.,* 402 U.S. 33 (1971)." A.13-14.

On March 29, 1973 the Dayton Board submitted a purported "plan" to the district court which responded to the four specifics of the district court's order but went no further in the way of pupil desegregation.[34] In essence the plan submitted by the Board merely expanded the "free choice" options which the district court had previously found (A.9-10) to be of negligible impact on the segregated pattern of pupil assignments. The Board refused to submit to the court an alternative plan of actual desegregation supported by the Superintendent and three of the seven Board members. (A plan was also proposed by the Dayton Classroom Teachers Association.) Plaintiffs filed objections to the plan submitted by the Board majority, and requested adoption of the more effective plan prepared by the Superintendent and the Board minority.

On July 13, 1973, the district court, without a hearing, entered an order approving, with one modificaiton, the relevant portions of the plan submitted by the Board majority, although the court expressed its "disappointment at the limited nature" of the remaining aspects of the plan. A.27.[35] Because this Court's

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[34] The plan submitted by the Board majority contained discussion of seven points in addition to the four particular requirements of the district court's opinion. These points related to "cultural exchanges," "control and learning centers," "musical stereopticons," and the like, all having nothing to do with actual school desegregation but requiring considerable busing and expense. A. 131-144.

[35] The district court modified the Board's Freedom of Enrollment proposal with respect to high school students. The court-ordered modification did not impose "majority to minority" transfers, which limit transfers to those that have desegregative impact.

decision in *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973), had intervened between the district court's February decision on violation and its July remedial order, the court apparently felt constrained to make some additional points about the scope of the Board's constitutional obligation. Relying on the *dissenting* part of Mr. Justice Powell's separate opinion in *Keyes,* the district judge listed a number of non-segregative aspects of the Board's *current* operation.[36] The court concluded (A.30):

> However, there has been evidence which indicates that the affirmative promotion of integration through these essential functions of the Board has not held an important place in the Board's priorities.
>
> The Powell rationale will operate prospectively. The Board's planning and implementation units must become capable of and sensitive to the racial effects which flow from the drawing of attendance lines, the construction and improvement of school facilities and the assignment of faculty, staff and pupils. All of such actions must henceforth be examined for their "integration impact."

Rather, the court modification provided "free choice" to all high school students of any high school, subject to priorities for those presently enrolled in a school and to space limitations. A.27-28.

[36] The court found, *inter alia*, that "[t]here is presently no evidence of a failure of equality of facilities, instructions and curricula opportunities nor has there been a persuasive proof that the Board, in recent times, drew attendance lines or built new facilities for the avowed purpose of minimizing integration." A.30. This holding was surprising, as the district court had refused to allow any party to introduce proof concerning inequalities in these particulars. R.I. 419-25, 1970, 1903. (HEW, in its 1969 Title VI noncompliance letter to the Dayton Board, found "that students at Roosevelt High School are not afforded the same educational opportunity as other students in [the] system." A.416.)

The court ordered "a retention of jurisdiction while a reasonable period of time is given to the School Board for this purpose." A.31. The court, however, did not consider or apply the standards established by the Court in *Keyes* to determine the scope of the Board's constitutional obligation or in evaluating the evidence of violation or the adequacy of proposed plans.

Plaintiffs' appealed and the Board cross-appealed to the United States Court of Appeals for the Sixth Circuit.

F. *Brinkman I*

On August 20, 1974 the Court of Appeals for the Sixth Circuit filed its opinion on plaintiffs' appeal and the Board's cross-appeal. A.32-69. Upon a careful review of the portions of the record placed in dispute, the court of appeals affirmed the district court's conclusion that there had been a cumulative violation of the Equal Protection Clause, based on the long history of unabated one-race schooling, the extensive use of optional zones to promote segregation, and the purposeful rescission of a system-wide program of desegregation. Moreover, because the Board did not contest the pre-*Brown* violation, the court found it unnecessary to review the evidence and district court findings in this regard. A.56.

The court also found it unnecessary to decide whether the 1972 Board's rescission of the 1971 Board's desegregation plan was an independent violation of plaintiffs' constitutional rights. Decision on this issue was unnecessary in the court's view because of its conclusion that at the relevant time the Board was under an affirmative constitutional duty to desegregate; consequently, a rescission of affirmative

action taken in accordance with that constitutional obligation served to compound the initial constitutional violation. A.55-56. The court of appeals also concluded that prior to *Brown* the Dayton Board's faculty-assignment practices were carried out pursuant to "an explicit segregation policy of the Board," and that the Board "effectively continued in practice the racial assignment of faculty through the 1970-71 school year." A.50; *see also* note 14, *supra*. With respect to site selection and school construction, grade structure reorganization, pupil transfers and transportation, and current faculty practices, the court of appeals detailed some of the considerable evidence supporting plaintiffs' claim that the Board's practices in these areas also constituted independent constitutional violations. A.61-66. The appellate court, however, reserved decision on the "serious question with respect to whether the District Judge's failure to include these . . . practices within the cumulative violation" (A.66-67) was supportable because of its view that the Board otherwise was under an affirmative obligation to desegregate. A.67.

The court found the "free choice" remedy ordered by the district court ineffective and, therefore, constitutionally inadequate "considering the scope of the cumulative violations"; the case was accordingly remanded with directions that a plan of desegregation be developed consistent with the remedial guidelines of *Keyes* and *Swann*. A.67-68. Quoting from *Keyes*, 413 U.S. at 200, the court concluded (A.68):

> Once the plaintiffs-appellants have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty

> . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" . . . When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school segregation are inadequate.

Finally, the court rejected all other "contentions of the parties contrary to the conclusions reached in [its] opinion . . ." A.69.

G. Remedial Proceedings.

Following the Sixth Circuit's remand in *Brinkman I*, the district court entered an order on January 7, 1975 directing the Dayton Board and any other interested parties to submit proposed plans of desegregation. A.70-72. The Board submitted a proposed plan (A.144-54), and plaintiffs also submitted a plan prepared by Dr. Gordon Foster, who had earlier prepared a plan of desegregation for the Board pursuant to its desegregation resolutions adopted in December 1971. *See* page 34, *supra*. The plan submitted by the Board was essentially a modification of the prior plan which had been found inadequate by the court of appeals in *Brinkman I*. Basically, it was a modified "freedom of choice" plan calling for the establishment in some schools of programs not offered in others. These special-program schools would be called "magnet schools" and "learning centers." The programs offered were to be designed to attract a limited bi-racial enrollment on a voluntary and, in the main, part-time basis. *See* A.144-54. At best, the Board's "curriculum plan" would have entailed actual full-time desegregation for only about 3,000 students, and another 3,400 students were to be affected only on a part-time basis. A.296-98.

Plaintiffs plan, in contrast, was a plan of actual system-wide desegregation. *See* A.298-99.

On March 10, 1975, following a hearing on the plans held February 17, 19, and 20, 1975, the district court entered its order (A.73-84). The court found that "[p]laintiffs' plan is a comprehensive one; it was carefully prepared and well-presented." A.78. But the court rejected plaintiffs' plan (A.79), and adopted instead, on a provisional basis, the plan submitted by defendants. A.79-81. The court reasoned that two intervening events "may well have changed both 'the nature of the violation' and the 'scope of the remedy.'" A.76. The first of these "events" was the decision in *Higgins* v. *Board of Education of the City of Grand Rapids,* 508 F.2d 779 (6th Cir. 1974), a case in which the Sixth Circuit had affirmed a district court judgment that pupils had not been unconstitutionally segregated on the basis of race. The second "event" was the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* The court determined that this Act required rejection of plaintiffs' plan. A.79. Accordingly, the court adopted the Board's plan on a provisional basis, although it recognized the very limited nature of the Board's proposals, as well as its failure to consider more promising alternative methods of accomplishing desegregation. The Board was directed to study the feasibility of adopting more significant measures for the following school year. A.81. The court certified its order for appeal pursuant to the provisions of 28 U.S.C. § 1292(b), because of its belief that its holdings with respect to the Equal Educational Opportunities Act "involve a controlling question of law as to which there is substantial grounds for a difference of opinion. . . ." A.84.

Plaintiffs immediately appealed, moving for summary reversal and requesting specific remedial directives from the court of appeals. On June 24, 1975, the court of appeals issued its opinion in *Brinkman II.* A.89-96. The court reiterated its previous opinion in *Brinkman I* to the effect that the Board was guilty of "[s]egregative acts and practices . . . both before and after the decision of the Supreme Court in *Brown* . . . [which] have continued down to the present time." A.89-90. The court added: "Although the phrase 'de jure' does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation practices." A.90. Upon analysis of the Board's plan as approved by the district court, the court of appeals determined that the plan did not conform to the mandate in *Brinkman I.* A.91. The court recognized that the Board's plan "contains some significant curricular innovations and that it would be a step toward integration of the Dayton school system," but that it "does not even purport to dismantle Dayton's one-race schools other than Miami Chapel and Roosevelt High School, and even if the magnet plans are successful, the vast majority of one-race schools will remain identifiable as such." A.93. The court of appeals rejected the district court's view that the two intervening "events"—the Sixth Circuit's decison in *Higgins* and the Equal Educational Opportunities Act—supported the limited remedy ordered. The court construed the Act, in accordance with the terms of 20 U.S.C. § 1702 (b), "as not limiting either the nature or the scope of the remedy for constitutional violations in the instant case." A.95. With respect to the second "event," the court said: "There could be no possible merit in the contention that the opinion of this court in *Higgins,*

relating to the school system of Grand Rapids, Michigan, altered in any way the nature of the cumulative violations described in our former opinion in the present case or the scope of the constitutional remedy required by this court on the remand which we directed in that opinion." A.95. Indicating that it would be inclined to grant plaintiffs' motion for summary reversal but for the difficulties of developing a "comprehensive plan" for the 1975-76 school year scheduled to begin in September, the court remanded the case to the district court with directions (1) to desegregate as many one-race schools as possible by September, 1975, (2) to enjoin the Board from reassigning the Miami Chapel black students to other all-black schools, and (3) to "adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*." A.96. The court of appeals directed that its mandate issue forthwith, and the Board's application for a writ of certiorari was subsequently denied by this Court. 423 U.S. 1000 (1975).

Upon the remand in *Brinkman II*, the district court appointed an expert, Dr. Charles Glatt, to examine the system and make desegregation recommendations. Dr. Glatt was murdered in the midst of his work. Thereafter, both plaintiffs and the Board presented plans to the district court, pursuant to its order of November 5, 1975. The Board's plan had been prepared by a team of experts appointed by the Board. The Board had voted to submit the plan to the court, but, by vote of 4-3, the Board had refused to approve the plan. A.305. The plan prepared by the Board's experts utilized diverse choice, zoning and curriculum differentia-

tion mechanisms for desegregation, but the plan did not specify actual pupil assignments, and no provision for transportation was included. R. III. 38-40, 52, 67-69, 101, 136-37, 149-51, 206-20, 252-53. Both plaintiffs' experts and the Board's experts were in agreement, however, that approximately 15,000 pupils would have to be transported under either the Board's plan or plaintiffs' plan, and that, because of Dayton's compact nature and the efficiency of its thoroughfares, complete, effective desegregation could be accomplished without presenting any threat to the health, safety or education of schoolchildren due to factors of time, distance and amount of transportation. A.304; R.III. 224; "A Desegregation Plan for the Dayton, Ohio Public Schools," at 127, 138 (Dec. 2, 1975) [the Board's plan].

Following a December 8, 1975 hearing, the district court entered an order on December 29, 1975 on the plans submitted. A.99-106. After summarizing the nature of the plans, the limited nature of federal judicial intervention, and the Board's broad discretion in matters of administrative and education policy (A.100-02), the court made the following statement (A.102):

> In contrast to the foregoing, it is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.
>
> The only feasible method of sharing requires a balancing in each school between black and white students in a ratio approximating the system-wide balance. Insofar as either plan will result in an acceptable redistribution, such plan meets the constitutional limitations set forth in both the *Swann* and *Keyes* cases.

> The defendants may adopt their own plan, may adopt the plaintiffs' plan, may combine the two, or any parts thereof, provided that each school in the school district as of September 1, 1976, is desegregated as defined herein.

Observing that the system was 48% black and 52% white, the court stated that any school would be deemed desegregated if it "reflect[ed] this district ratio plus or minus 15%." A.103. The court ordered the Board to implement a plan seeking to achieve for each school a "pupil population approaching the district percentage, but deviating no more than 15%, plus or minus." *Id.* The court set forth two exceptions to this requirement. First, it allowed all students already enrolled in high schools to remain at their present school through graduation because of the importance the court attached to high school "loyalty." *Id.* Second, citing *Swann,* 402 U.S. at 24, the court held that "where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school by-school basis." A.104. The court then appointed Dr. John A. Finger (who had been the district court's expert in *Swann*) to act as Master pursuant to Rule 53, FED. R. CIV. P., to work out the details of a plan with Dayton school officials. The following guidelines were set for the Master with respect to elementary students (A.104):

> 1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
>
> 2. Students should be transported to the nearest available school;

> 3. No student should be transported for a period of time exceeding (20) minutes, or two (2) miles, whichever is shorter.

The court also appointed a citizens board to monitor the plan for a period of at least three years. A.105. The court concluded its order with four conclusions of law: (1) "A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated system as contemplated in *Keyes* . . . and *Swann* . . ." (A.105-06); (2) "Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such system" (A.106); (3) So long as such a desegregated system is established, "[e]ducational techniques, experimental schools and expanded parent choice are not matters relating to constitutional deprivations. . ." (*id.*); and (4) the Board "must provide adequate transportation for all students affected by reassignment to comply with this Order." *Id.* A judgment in conformity with this order was entered on the same day. A.107-109.

On March 15, 1976 the Master submitted his report. A.157-75. The Master recommended that elementary schools be desegregated primarily on the basis of the common technique of pairing schools. With respect to high schools, the Master relied on a program of choices and random assignments limited by racial guidelines. Under his plan, the Master estimated that the maximum distance of travel for any student would be somewhat in excess of 5 miles, but that the longest travel time "should not exceed 20 minutes." A.162.

The district court conducted a hearing on the Master's report on March 22 and 23, 1976. At this hearing,

the Dayton Board requested several modifications of the Master's plan: to be allowed to reassign pupils to paired schools in advance in the Spring by the central administration, rather than by the school principals on the first day of the 1976-77 school year; to be allowed to exchange paired schools (with no transfer of teachers) on an annual rather than semi-annual basis; to be allowed to assign high school students on geographic-zone rather than choice and random-assignment bases; and to phase in the elementary plan over three years (including withholding some 8 schools from the desegregation plan for the 1976-77 year). R.III. 288-89. The Board presented no argument, testimony, or any other evidence that any school or child should be excluded from the plan because of any geographic location or claim of excessive distance or time involved in reassignment and transportation.

On March 23, 1976 the district court entered its final order approving the proposed desegregation plan of the Master, with modifications, and directing the Dayton Board to implement the plan for the 1976-77 school year. A.110-13. The court gave the Board the discretion either to implement the Master's report or the Board's proposed modifications, except insofar as the Board sought a three-year phase-in of the plan at the elementary level. A.110-11. The district court also expressed its willingness to consider proposed modifications to the plan at any time from any party. A.112. A judgment was entered on March 25, 1976 in accordance with the March 23 order. A.114-16. Thereafter, the Dayton Board sought six additional modifications which, with one exception (concerning the exclusion of eighth graders from the plan), the district court approved by an order of May 14, 1976. A.117.

The Dayton Board then appealed, and their appeal was heard by the Sixth Circuit on an expedited basis. The court of appeals issued its decision in *Brinkman III* on July 26, 1976. A.118-23. The court of appeals noted that although its decision in *Brinkman II* had

> ordered system-wide desegregation, the Board proposed no plan to achieve this mandate and made no showing of the existence of conditions related to the topography of the Dayton area, location of natural or artificial barriers, geographic isolation or similar considerations which might militate against an order requiring cross-district transportation of pupils. [A.121.]

As to the Board's argument that the district court's guiding standard that each school should be within the district-wide racial ratio, plus or minus 15%, the court of appeals said (A.121-22):

> Rather than establishing a fixed mathematical requirement as the Board claims it does, this formula provides a flexible basis of pupil assignment similar to that approved by the Supreme Court in *Swann, supra.* The flexibility of the district court's judgment is further illustrated by the exemption of two entire grades of high school students, the provision for variations from the plus or minus 15% requirement "in exceptional circumstances" and the options granted the Board which permitted it to choose alternate methods of achieving desegregation rather than being required to follow in every detail the plan submitted by the Master. We view the use of mathematical ratios in this case as no more than "a useful starting point" in shaping a remedy for past discrimination. *Swann, supra,* 402 U.S. at 25.

As to the language in the district court's order of December 29, 1975 pertaining to a constitutional right

of all students to "share equally all facilities of a school system, both the superior and the inferior," the court of appeals said (A.122):

> When considered out of context and read literally the quoted language does appear to create a right which the federal courts have never recognized. However, in the context of the order this statement appears to be nothing more than an affirmation that a system-wide desegregation plan must necessarily involve all facilities of a school system and that pupil assignments will be made as required to eliminate the vestiges of past discrimination without regard to the comparative quality of the various facilities. Be that as it may, the quoted language does not appear in the judgment, which is the instrument this court reviews on appeal.

Finally, the court of appeals dealt with an argument raised by the Board for the first time at oral argument: that the district court's order required periodic changes in the Dayton plan to maintain a fixed racial balance in perpetuity in violation of this Court's intervening decision in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976). The court found that this contention was completely without merit: "The short answer to this argument is that the judgment directs no changes after the 1976-77 school year." A.123. The court noted that the plan ordered by the district court "established the first constitutionally sufficient desegregation plan for the Dayton system. If adjustments to this plan are sought by any of the parties in future years the district court will necessarily consider the limitations of *Spangler* in dealing with such requests." *Id.*

Thereafter, both the court of appeals and Mr. Justice Stewart, as Circuit Justice, denied the Board's applications for a stay of the judgment in *Brinkman III*, and the Board implemented the plan at the start of the 1976-77 school year. On January 17, 1977, this Court granted the Board's petition for writ of certiorari.

SUMMARY OF ARGUMENT

1. The linchpin of petitioners' case is their claim that the Dayton Board has never operated a racially dual school system as defined by this Court's decisions. If that claim is mistaken, their case falls. As set forth in the Statement of the Case, *supra,* there can be no doubt that a basically dual system existed at the time of *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), and was never dismantled until the federal-court intervention here. Thus, a district-wide desegregation plan was constitutionally required under *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U.S. (1971), to dismantle the dual system which existed in Dayton at the time of *Brown* and which continued to flourish thereafter. *See* pages 58-71, *infra.*

2. Petitioners' case also falls on an alternative ground: the wide-spread *de jure* segregation extant at the time of *Brown,* coupled with racially discriminatory faculty and pupil assignment practices thereafter and the rescission of the Board's single undertaking of its affirmative obligations, constituted a *prima facie* case of system-wide intentional segregation which the Board has failed to rebut. The plan ordered below was therefore mandated by the "all-out

desegregation" commands of *Keyes* v. *School Dist. No. 1,* 413 U.S. 189 (1973), and *Swann. See* pages 72-85, *infra.*

3. The system-wide remedy already in place in the Dayton public schools is fair and equitable and is designed to remedy the constitutional violation. It is a plan of actual desegregation under *Swann* and *Keyes.* The plan is not "racial balance," nor does it require annual adjustments contrary to *Swann* or *Pasadena City Board of Educ.* v. *Spangler,* 427 U.S. 424 (1976). Petitioners' further claim that the plan will inevitably result in resegregation is not supported by the record and is irrelevant under this Court's decisions in *Brown* v. *Board of Educ.,* 349 U.S. 294 (1955) ["*Brown II*], *Cooper* v. *Aaron,* 358 U.S. 1 (1958), and *Monroe* v. *Board of Comm'rs,* 391 U.S. 450 (1968). *See* pages 85-94, *infra.*

4. Finally, petitioners' attack upon plaintiffs' status to prosecute this case is unwarranted. Plaintiffs include black and white pupils in the Dayton public schools who have suffered from petitioners' prior *de jure* segregated system of schooling and are now for the first time attending schools in transition to a racially unitary system. Under *Spangler,* plaintiff's stake in this controversy is real and their standing cannot be questioned. *See* pages 95-101, *infra.*

ARGUMENT

Before this Court, petitioners claim that the court of appeals has acted out of a desire to impose upon the Dayton school district system-wide racial balance as a matter of substantive constitutional right. To support

this argument the Board relies upon imprecise language in the various opinions and orders of the district court which have been superseded by the judgments of the court of appeals. Then, by interweaving excerpts from this free-wheeling language with equally selective citations to the extensive evidentiary record and even less-frequent references to the three decisions of the court of appeals, petitioners assert that the gaps between the system-wide remedy ordered below and any unconstitutional conduct on their part is so great that the conclusion is inescapable that the court of appeals has defined racial imbalance as a *per se* violation of plaintiffs' substantive constitutional rights. *See* Pet. Br. at 15-30.

We agree with petitioners that there are noticeable differences in pitch between the decisions of the court of appeals and those of the district court; and that the district judge did all he could on the first remand to avoid compliance with the court of appeals' mandate in *Brinkman I* to remedy the violation. *Cf.* Pet. Br. at 15-16, 28. We also agree that there are interstices in the decisions and orders entered below. But we find it considerably easier to fill in these gaps than do petitioners. The settled portions of the record bring the remedy flush with the constitutional violation and make constitutionally unassailable the determination below that plaintiffs are entitled to system-wide relief from the extensive *de jure* segregation of the Dayton public schools.

I. THE BOARD OPERATED A RACIALLY DUAL SCHOOL SYSTEM AT THE TIME OF *BROWN* WHICH WAS NOT DISESTABLISHED PRIOR TO IMPLEMENTATION OF THE DESEGREGATION PLAN ORDERED BELOW.

Petitioners necessarily concede that an "affirmative duty arises to dismantle and to eliminate the identifiability of one-race schools . . . [where there is] a finding of a dual system mandated by state statute or a dual system predicated upon evidence establishing state-imposed segregation in a substantial portion of the school district." Pet. Br. at 15. We concede that there was no Ohio statute mandating a dual system in Dayton after 1887. But there *has* been a dual school system in Dayton spanning two-thirds of a century, albeit one created and maintained by petitioners and their predecessors in direct defiance of state law.

In *Green* v. *County School Board,* 391 U.S. 430 (1968), and companion cases,[37] this Court refined the command of *Brown II* that school districts operating statutory dual systems must "effectuate a transition to a racially non-discriminatory school system." 349 U.S. at 301. *Green* emphasized that although the Court in *Brown II* had recognized that the transition would not be easy, "[s]chool boards...then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-38. Finally, in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S.

[37] *Raney* v. *Board of Educ.,* 391 U.S. 443 (1968); *Monroe* v. *Board of Comm'rs,* 391 U.S. 450 (1968).

1 (1971), and companion cases,[38] the Court held that the command "to dismantle dual school systems" (*id.* at 22) entails making "every effort to achieve the greatest possible degree of actual desegregation. . . . [and] warrants a presumption against schools that are substantially disproportionate in their racial composition." *Id.* at 26.

In *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973), the Court for the first time addressed the constitutional principles applicable to school segregation in the so-called "northern" context in which state law did not mandate racial segregation at the time of *Brown.* Because of the absence of state laws mandating school segregation in this context, the Court determined that plaintiffs challenging such school segregation under the Fourteenth Amendment "must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." *Id.* at 198. In other words, plaintiffs must prove "*de jure* segregation" which is differentiated from "adventitious" segregation by official "*purpose* or *intent* to segregate." *Id.* 208 (emphasis in original). Although the initial burden of proof in such cases is therefore on the plaintiffs, the Court also held (*id.* at 201):

> [W]here plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.

[38] *Davis* v. *Board of School Comm'rs,* 402 U.S. 33 (1971); *McDaniel* v. *Barresi,* 402 U.S. 39 (1971); *North Carolina State Board of Educ.* v. *Swann,* 402 U.S. 43 (1971).

In *Keyes* the Court reviewed lower court findings that the Denver School Board, with respect to the Park Hill area of the district, had been "found guilty of following a deliberate segregation policy at schools attended, in 1969, by 37.69% of Denver's total Negro school population, including one-fourth of the Negro elementary pupils, over two-thirds of the Negro junior high pupils, and over two-fifths of the Negro high school pupils." *Id.* at 199. With respect to the remainder of the system, however, the lower courts in *Keyes* had found no such deliberate segregative policies or practices. This Court nevertheless recognized that racially discriminatory practices of segregating blacks in one portion of a school district have a "reciprocal effect" on the remainder of the district: "common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Id.* at 203; *see also id.* at 201-203. Consequently, a dual system may be found to exist upon "proof of state-imposed segregation in a substantial portion of the district. . . ." *Id.* at 203. The Court held that the Denver school district's "deliberate racial segregation policy with respect to the Park Hill schools [would be sufficient to] constitute[] the entire Denver school system a dual school system" (*id.* at 204), unless the school board could show "that Park Hill may be separated from the rest of the Denver school district as a separate, identifiable, and unrelated unit." *Id.* at 205.

The Court also noted that where such a "northern" dual system is found, "as in cases involving statutory dual systems, the school authorities have an affirmative duty 'to effectuate a transition to a racially non-discriminatory school system.'" *Id.*, quoting *Brown II.*

In determining whether school authorities have met this "affirmative duty," the Court explained one of the reasons supporting the *Swann* presumption against one-race schools in a system with such a history of segregation (413 U.S. at 211):

> a connection between past segregative acts and present segregation may be present even when not apparent and . . . close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.

A. A Dual System Existed In The Dayton Public Schools At The Time Of *Brown I.*

The record in the instant case, which we have detailed at pages 8-19, *supra,* conclusively shows the existence of such a dual school system in Dayton at the time of *Brown.* At that time, a substantial majority of the black public school children in Dayton attended schools which had been deliberately created or converted into schools for blacks only. And almost *all* black teachers in the system were assigned to these blacks-only schools pursuant to an explicit and degrading policy of racial discrimination. This state-imposed system of intentional segregation was probably as perfect as it could have been without the aid of a state law mandating absolute apartheid.[39] No showing was or

[39] As shown in the Statement, *supra,* the Board was operating about 50 schools at the time of *Brown.* Of the 35,000 pupils in the system, 19% were black. At least 54% of the system's black students were attending four schools officially designated for blacks only, and at least another 19% of the black pupils in the system were attending five other schools that had just been effectively converted (one had just been constructed) into black schools. Thus, about three-fourths of all black pupils attended black schools, and

could have been made that the resulting segregation was cabined "within a separate, identifiable or unrelated unit" (*Keyes*, 413 U.S. at 205) of the Dayton school district. Under *Keyes*, therefore, no conclusion is permissible except that the Dayton Board was operating a dual system at the time of *Brown*.

Petitioners assert the contrary, however, as they must; their entire brief is premised on the assertion that there was never such a dual system in Dayton. They cite no evidence to support this claim, and they cite no finding by the court of appeals. Nor do they refer to the district court's initial findings of fact and conclusions of law to support the proposition that makes or breaks their case. Rather, they refer to language written for the first time by the district court on remand following the court of appeals' reversal in *Brinkman I* of the district court's "free choice" remedy. Pet.Br. at 10, 19, 30. This language of the district court makes no reference to the controlling standards announced in *Keyes* the year before. Its total content is as follows (A.75, 77):

> 1. The State of Ohio does not now, nor has it since 1887 mandated a dual system of public education. To the contrary, 84 Ohio Law 34, dated February 22, 1887, specifically required a unitary public school system.
>
> 2. The defendant School Board of the City of Dayton had engaged in activities which were segregative in effect and which did impinge upon the Constitutional rights of students in such system. At no time, however, did defendant maintain a dual system of education.

83% of the system's white pupils attended virtually all-white schools. *See* pages 15-16, *supra*.

> 3. Overt evidence of such segregative activities have been eliminated both by action of the Board of Education and by previous Order of this Court but the effect thereof may not.
>
> * * *
>
> We do not deal with a mandated dual system; we do not deal with actions taken on a school-by-school basis. We do deal with a system that has in the past permitted segregative practices to exist.

These words will not support petitioners' claim.

We recognize that "[j]udges who are reversed by a higher court sometimes need . . . [an] outlet," and that "[f]or this reason opinions on remand should occasionally be read with tolerance and understanding. . . ."[40] Petitioners, however, assert that the above-quoted language "establishes that the Dayton district was not operating a mandated dual system as proscribed in *Brown I* . . . [and was not guilty of] state-imposed segregation in a substantial or significant portion of the district . . . ." Pet.Br. at 19. There are several reasons why petitioners' contention is not tenable, whether the district court's language is viewed with sympathy or critical analysis.

First, as previously noted, the district court's references to the "dual system" were made at the remedial stage of this case following a reversal and remand for remedy by the court of appeals. The district court made no such finding and offered no such conclusion in its opinion issued immediately following the trial on the merits. Indeed, at that time the court did not dispute the existence of a dual system at the time of

[40] *Stanton* v. *Stanton*, 45 U.S.L.W. 3506 (U.S. Jan. 25, 1977) (Stevens, J., dissenting in part).

Brown. Rather, the court's first opinion simply discounted the eggregious facts of pre-*Brown* discrimination because of its view that "[b]oth by reason of the substantial time that has elapsed and because these practices have ceased, . . . [they] will not necessarily be deemed to be evidence of a continuing segregative policy." A.3. That off-hand disposition, of course, turned out to be a legal mistake in light of this Court's subsequently-issued opinion in *Keyes,* 413 U.S. at 210-11:

> We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

But even after the *Keyes* opinion became available, the district court did not reassess this mistake; instead, its only discussion of *Keyes* focused exclusively upon the dissenting part of Justice Powell's separate opinion. A.29-31; *see also* note 36, *supra,* and accompanying text.

Second, the language of the district court reveals no understanding of the term "dual system." As nearly as one can tell from reading the district court's "dual system" references—indeed, from reading the March 10, 1975 order in its entirety—the district court believed that a dual system could not exist unless mandated by state law. This notion, of course, was also expressly rejected in *Keyes*. 413 U.S. at 201-204.

Third, whatever the district court may have meant in that order, it was squarely rejected by the subsequent decision of the court of appeals in *Brinkman II*. In that opinion, the Sixth Circuit, stating that it would have granted plaintiffs' motion for summary reversal but for the time factor, held (A.90):

> Although the phrase "de jure" does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation practices. *See Keyes* v. *School District No. 1,* 413 U.S. 189 (1973).

Petitioners' reliance on the district court's language in the March 1975 order is therefore unfounded because that order has been displaced by the court of appeals in accordance with this Court's decision in *Keyes*.[41]

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[41] This case does not call for further elaboration of the *Keyes* "*purpose* of *intent* to segregate" standard. 413 U.S. at 208 (emphasis in original). *See also Castaneda* v. *Partida,* 45 U.S.L.W. 4302 (U.S. March 23, 1977); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977); *Washington* v. *Davis,* 426 U.S. 229 (1976). While we do not understand the standard to require us to accuse petitioners and their predecessors of subjective racial malevolence, *cf.* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction,* 86 YALE L.J. 317 (1976), the record here supports such an accusation. But we also think it clear that inquiry into the *subjective* motive of the decision-maker is not required. As Justice Stewart has written, while he was a Sixth Circuit Judge, in *Clemons* v. *Board of Educ. of Hillsboro,* 228 F.2d 853, 859 (6th Cir. 1956):

> The Board's action was . . . not only entirely unsupported by any color of state law, but in knowing violation of the Constitution of the United States. The Board's subjective purpose was no doubt, and understandably, to reflect the 'spirit of the community' and to avoid 'racial problems,' as testified by the Superintendent of Schools. But the law of Ohio and the Constitution of the United States simply left no room for the Board's action, whatever motives the Board may have had.

Similarly, the lower courts in the "northern" school cases decided

Fourth, and finally, the claim that the Dayton Board never operated a dual school system is wrong as a matter of uncontestable fact. Although the court of appeals can be criticized to some extent for occasionally adopting the loose approach to constitutional terminology that pervades the district court's opinions and orders, it is at least unmistakably clear from the court of appeals' judgment that it thought plaintiffs had proved their entitlement to a system-wide remedy. It is that judgment which we appear here to defend. Moreover, it is also plain from the court of appeals' determination of facts in both *Brinkman I* and *Brinkman II* that it believed that plaintiffs had proved intentional segregation of system-wide magnitude. While there may be some dispute as to whether the court of appeals precisely anchored its holding on the existence of a dual system at the time of *Brown*,[42]

in the post-*Keyes* era have generally not required plaintiffs to prove subjective racial animus. *See, e.g., Armstrong* v. *Brennan*, 539 F.2d 625 (7th Cir. 1976); *United States* v. *School Dist. of Omaha*, 521 F.2d 530 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); *Hart* v. *Community School Bd. of Educ.*, 512 F.2d 37 (2d Cir. 1975); *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Oliver* v. *Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Bradley* v. *Milliken*, 484 F.2d 215 (6th Cir. 1973), *aff'd in relevant part*, 418 U.S. 717, 738 n.18 (1974). Rather, these cases require only a showing of objective purpose or intent to segregate

[42] We believe, however, that a fair reading of the court of appeals' opinions shows its recognition of the existence of a *de jure* segregated system at the time of *Brown*. First, in *Brinkman I*, the court discusses the "Historical Background of School Segregation in Dayton." A.39-48. In this discussion, the court recounts that in the face of Ohio law outlawing racially discriminatory schooling since at least 1888 and a 1926 Ohio Supreme Court decision expressly informing the Dayton Board not to segregate schools on the basis of race, the Dayton Board nonetheless, as found by the

the record irrefutably establishes such a system. *See* note 39, *supra*.[43] Petitioners' assertions of non-dualism must accordingly be rejected.

district court, proceeded to do so. A.39-40. The court of appeals did not elaborate on the evidence supporting this "historical determination" because "that is not challenged on appeal . . ." A.39. Second, again in *Brinkman I*, the court of appeals notes the "basically dual school system inherited at the time of *Brown*" and the "explicit segregation policy of the Board" prior to the 1951-52 school year and effective continuation thereafter, in discussing but not deciding other violation issues on which it reserved decision. A.56. Third, again in *Brinkman I*, the court of appeals, in describing the Board's remedial obligations, held (A.68):

> Once the plaintiffs-appellants have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" *Keyes, supra*, 413 U.S. at 200.

Thus, the court of appeals, as required by *Keyes*, directly rejected, on the facts of this case, the Dayton Board's contention "that the *Brown I* rationale relied upon by the plaintiffs is only applicable to those school districts where a dual system was compelled or authorized by statute and has no applicability where a statutory dual system has never existed." Brief for Dayton Board of Education, 6th Cir. Nos. 73-1974, -1975, at page 22. Finally in *Brinkman II*, the court of appeals reiterated this statement of the affirmative obligation of a dual school system (A.90), and recounted the long history of *de jure* segregation in the Dayton public schools (A.89-90).

[43] The existence of a dual system at the time of Brown thus need not depend on the burden-shifting principles and evidentiary presumptions set forth in *Keyes*. *See* Argument II, *infra*. The existence of such a system is established as a matter of overwhelming fact. We cannot conceive how the Dayton-style dual system could have lesser legal consequence than the Charlotte-Mecklenburg type, for comparative example. There is a small factual difference, of course, since in Dayton 75% of the students were directly segregated by race in 1954, compared to 100% in Charlotte. To draw from this factual difference a conclusion that the two systems had different long-run consequences, however, is to make finer socio-

When *Brown I* was decided on May 17, 1954, therefore, the Dayton Board became constitutionally obliged to uproot the dual system it had spent at least forty years creating in doubtful compliance with *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), and in open defiance of equally-longstanding Ohio law. In the fifteen years following *Brown* the Dayton Board may have complied in some respects with *Plessy* (*see* note 36, *supra*), but it ignored *Brown.*

B. The Board Never Complied With *Brown II.*

At this point petitioners' case collapses in this Court just as it did in the court of appeals. For once the existence of a dual system at the time of *Brown* is established, the remedial principles of *Brown II* and its progeny become applicable. *See Keyes, supra,* 413 U.S. at 200-203, 213-14; *Brinkman I,* 503 F.2d at 704 (A.68); *Brinkman II,* 518 F.2d at 854 (A.90). Under these principles, the Board was obligated from the time of *Brown II* to disestablish the basically dual school system inherited. To fulfill that obligation, the Board had to "make every effort to achieve the greatest possible degree of actual desegregation . . . [C]ompliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition." *Swann, supra,* 402 U.S. at 26. Or, in the language of one of the *Swann*

logical distinctions than either social scientists or federal judges are capable, or than the Fourteenth Amendment requires. *Keyes,* 413 U.S. at 200-03. And clearly the fact that this dual system was created in defiance of, rather than being mandated by, state law does not alter the constitutional consequences of the Dayton Board's intentional segregation at the time of *Brown. Cf. Monroe* v. *Pape,* 365 U.S. 167, 194-201 (1961) (Harlan, J., concurring).

companion cases, the Board was required to "make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Commissioners, supra,* 402 U.S. at 37.

The Dayton Board has never contended that it has met its affirmative obligation under these post-*Brown* mandates. Nor could it. *See* A.5, 9-10.

Indeed, the courts below have found that instead of "eliminat[ing] from the public schools all vestiges of state-imposed segregation" (*Swann, supra,* 402 U.S. at 15), petitioners and their predecessors aggravated the constitutional violation by continuing to engage in a number of racially discriminatory practices. For example, at least until federal intervention by HEW in 1969, the Board persisted in the "racial assignment of faculty" (A.56) by assigning black teachers to identifiably black schools and white teachers to identifiably white schools. *See* pages 20-24, *supra; Swann, supra,* 402 U.S. at 18; *Keyes, supra,* 413 U.S. at 209.[44] In addition, the Board, as found by the courts below, intentionally employed optional attendance zones with the segregative effect of identifying schools as black

[44] Petitioners appear to argue (Pet. Br. at 18) that the Board's employment of substantial numbers of black teachers is evidence of affirmative action. However, in school systems in almost every state which had explicit segregation laws the proportionate number of black teachers was as substantial as in Dayton. And as in Dayton, the "southern" districts also assigned pupils and teachers to schools, in the words of *Brinkman I,* "pursuant to an explicit segregation policy." A.56. Thus, the presence of a substantial number of black teachers may in some cases be evidence of non-discriminatory hiring; in others, it is the legacy of an explicitly dual system of hiring and assigning teachers on a racial basis, as in Dayton.

or white and allowing white children assigned to the attendance areas for black schools to escape. *See* pages 24-30, *supra*. This device, reminiscent of the mainstay of the "southern" style of dualism (*see Green, supra,* 391 U.S. at 432), was totally inconsistent with the Board's avowed purpose of operating under the "neighborhood school concept." *See, e.g.,* A.13.

Other Board action, at a minimum, was ineffective in dismantling the dual system. For example, the Board's Freedom of Enrollment policy only perpetuated the racial identity of schools. A.9-10; *See* note 28, *supra*. In practice, this policy operated as ineffectively as the "freedom of choice" and "free transfer" provisions condemned in *Green* and companion cases as wholly inadequate desegregation techniques. The Dayton policy was simply "a method [of] achieving minimal disruption of the old pattern. . . ." *Monroe* v. *Board of Commissioners, supra,* 391 U.S. at 458.[45]

[45] While the district court declined to find segregative intent with respect to several pupil-assignment practices, it did affirmatively find that "no effort has been made by the school board of Dayton to balance by race the student population at any particular school" (A.5), and that the "affirmative promotion of integration . . . has not held an important place in the Board's priorities." A.30. As previously noted (*see* note 33, *supra*), "balance by race" and "racial imbalance," in the confusing usage employed by the district court, mean, respectively unsegregated and segregated. The district court's findings that the Board's zoning practices have had "neither segregative nor integrative effect" (A.6), that the Board used its site-selection and school-construction practices to locate schools in one-race areas (A.7), and that the Freedom of Enrollment policy was of negligible desegregative value (A.9), foreclose any possibility that the Board has complied with *Brown II*. Although these district court findings have been superseded by the court of appeals' decision in *Brinkman I* (A.61-67) reserving decision on plaintiffs' contention that the Board's practices in these

Not until 1971 did the Board stand up to its sworn duty and act decisively by adopting a system-wide program of desegregation to comply with its duty to convert to a unitary system. But this affirmative action by the 1971 Board was quickly rescinded by the newly-composed 1972 Board and the dual system reinstated. *See* pages 30-35, *supra*. "This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system." *Green, supra,* 391 U.S. at 438.

Clearly and convincingly, plaintiffs have established their entitlement to a system-wide remedy under this Court's controlling decisions in *Brown II, Green, Swann* and *Keyes*.

areas constitute "independent constitutional violation[s]" (*Washington* v. *Davis,* 426 U.S. 229, 243 (1976), quoting *Wright* v. *Council of City of Emporia,* 407 U.S. 451, 459 (1972)), the law of the case *at least* establishes that the Board never fulfilled its affirmative obligations to dismantle the dual system. " 'Racially neutral' assignment plans," are inadequate as a matter of law when they "fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation." *Swann, supra,* 402 U.S. at 28. The Board's pre-*Brown* practices presented just such a " 'loaded game board,' " which required the Board in the post-*Brown* era to take "affirmative action in the form of remedial altering of attendance zones . . . to achieve truly nondiscriminatory assignments." *Id.* Even if it be assumed *arguendo* that the Board was totally "color blind" after *Brown,* that was plainly not enough. This Court has denounced as wholly inadequate a policy that "exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement, against the background of segregation, would render illustory the promise of *Brown. . . .*" *North Carolina State Board of Educ.* v. *Swann, supra,* 402 U.S. at 45-46. *See also McDaniel* v. *Barresi, supra,* 402 U.S. at 41.

II. ALTERNATIVELY, PLAINTIFFS MADE OUT AN UNREBUTTED *PRIMA FACIE* CASE OF SYSTEM-WIDE INTENTIONAL SEGREGATION REQUIRING A SIMILAR REMEDY.

We think the foregoing argument is sufficient to refute petitioners' contention that plaintiffs are not entitled to comprehensive relief. If for reasons not apparent to us we are wrong, then we submit that proper application of the burden-shifting principles announced in *Keyes* is dispositive. This argument need not be reached unless the Court determines that *Brown II* relief (*i.e.*, as enunciated in *Green* and *Swann*) is triggered only to eliminate the vestiges of that total segregation mandated by express state laws existing at the time of *Brown I*. In our view, that result would balkanize the Fourteenth Amendment, giving it a different practical meaning for the North than it has for the South. Even if we are wrong in reading *Keyes*, 413 U.S. at 200-03, 213-14, as specifically rejecting that regional approach to remedy, the law of violation settled by *Keyes* mandates system-wide relief for plaintiffs.

A. Plaintiffs' Made Out A *Prima Facie* Case Of System-Wide *De Jure* Segregation.

There are four elements to our *prima facie* case under the burden-shifting principles set out in *Keyes*: (1) the "northern"-style dual system extant at the time of *Brown;* (2) the continued racial assignment of faculty at least until 1969; (3) racially discriminatory optional attendance zones created and maintained throughout the post-*Brown* era; and (4) the 1972 Board's rescission of the 1971 Board's desegregation program.[46]

[46] The court of appeals reserved decision on, and thereby suspended, the district court's findings with respect to site selection and school construction, grade structure and reorganization, and pupil transfers and transportation. We have summarized the evidence relating to these areas in Appendix A, attached hereto (*see* note 14, *supra*). In our view, these facts prove beyond a reasonable doubt and to a moral certainty that the entire Dayton system in all relevant school administrative practices is infected with intentional racial discrimination. It is also our firm belief, however, that Argument I above is conclusive and the points made in this Argument II are more than adequate under the burden-shifting principles of *Keyes*, without regard to these reserved issues. If the Court rejects both Arguments I and II, however, then it will be necessary for this Court either to evaluate the evidence set out in Appendix A or, "rather than deal with the merits of the question in this Court" (*Dandridge* v. *Williams*, 397 U.S. 471, 476-77 n.6 (1970)), to remand to the court of appeals for its disposition of these reserved issues.

1. Dayton's 1954 dual system "did not relate to an insubstantial or trivial fragment of the school system." *Keyes, supra,* 413 U.S. at 199. Rather, it contained a substantial majority of Dayton's public school pupils in schools intentionally segregated on the basis of race. Moreover, virtually all faculty and staff were then deliberately assigned to schools on a racial basis, with "the clear effect of earmarking schools according to their racial composition. . . . " *Id.* at 202. It is therefore doubtful that there was not a racially identifiable school in Dayton in 1954. *See* pages 15-19, *supra.* And this extensive separation of the races was the direct product of outspoken, official racial discrimination beginning at least as early as 1912 and continuing, perhaps with modification but surely without interruption, until 1954. It may not have been a perfect system of complete segregation, but the breaches were few and far between. *See* pages 18-19, *supra.*

2. The assignment of faculty and staff on the basis of race continued with slight change until 1969, when

HEW, under its mandate of Title VI of the Civil Rights Act of 1964, objected to the Board's "policy of racially motivated assignment of teachers and other professional staff." A.415.[47] Only then did the Board begin to effectively disestablish the dual system of faculty and staff assignments. But simple faculty desegregation that late in the day was plainly not enough to counter the entrenched effects of this longstanding practice of intentional segregation, which for over 60 years had "earmark[ed] schools according to their racial composition." *Keyes, supra,* 413 U.S. at 202. *See* note 20, *supra,* and accompanying text.[48]

3. We have previously outlined the evidence showing the racially discriminatory operation of optional

[47] The court of appeals reserved ruling only on whether the racial identifiability of faculty assignments at the time of trial constituted a continuing faculty-assignment constitutional violation. *See* note 14 and page 44, *supra.*

[48] In Dayton the pre-*Brown* faculty-assignment policy did much more than just "earmark" schools as "black" or "white." As the court of appeals determined in *Brinkman I*, the Dayton Board long "assigned all black teachers only to schools with all black pupils . . . pursuant to an explicit segregation policy of the Board." A.56. Through 1951 this "explicit segregation policy" *never* allowed a black teacher to instruct a white child; as a result, every time the Board assigned black teachers to a class or school, its explicit policy and unswerving practice was also to exclude or otherwise transfer all white students (and their white teachers) to other classrooms and schools and to assign only black students to these all-black schools. *See* pages 8-15, 18-19, *supra.* There is little wonder therefore that, when the Board in 1951-52 substituted an ostensibly new policy concerned only with the racial preferences of white teachers and white schools, the former policy "effectively continued in practice through the 1970-71 school year." A.56. And the effect of this continuing racial practice on the identification of schools as "black" or "white" was nearly as great, albeit not as direct, as the former policy.

attendance zones. *See* pages 24-30, *supra.* This is a classical segregation device, which the lower courts have found to exist with considerable regularity in the "northern" cases;[49] and they have consistently concluded that such optional zones are, in Judge Wisdom's words, "unadulterated segregation." *United States* v. *Texas Education Agency,* 467 F.2d 848, 867 (5th Cir. 1972). Petitioners' effort (Pet.Br. at 22-25) to minimize the impact of this conceded unconstitutional practice makes too little of the district court's findings and not enough of the record. The district court's general finding with respect to optional zones specifically identifies four examples effecting segregation at seven schools (including one of the six optional zones created in the West-Side Reorganization in 1952 (*see* note 21, *supra*)). A.8. When the finding of a city-wide blacks-only optional zone for high school students is included (A.4-5),[50] *all* high schools were also directly affected by such "unadulterated segregation." In addition to city-wide zones, the unrebutted evidence shows that optional zones directly effected segregation between some 15 pairs of schools substantially disproportionate in their racial composition. *See* pages 25-26, *supra.* By any definition, 30 schools in a system with less than 70 schools relates to much more than "an insubstantial or trivial fragment of the school system." *Keyes, supra,* 413 U.S. at 199; *see also id.* at 201-05.[51]

[49] *See, e.g., United States* v. *School Dist. of Omaha, supra,* 521 F.2d at 540-43, and cases cited; *Bradley* v. *Milliken, supra,* 484 F.2d at 232-35, and cases cited.

[50] *See* note 10, *supra.* In addition, Patterson Co-Op for many years functioned as a city-wide high school for whites. *See* note 22, *supra.*

[51] The elimination of such optional zones does nothing to limit

4. The final element of the *prima facie* case is the Board's rescission of its 1971 resolutions to desegregate the Dayton public schools. The rescission might have lesser constitutional significance if the 1971 resolutions had been predicated solely, or even primarily, upon a determination that, as a matter of educational policy, the public schools should be integrated "in order to prepare students to live in a pluralistic socety. . . ." *Swann, supra,* 402 U.S. at 16. But that was not the case. Rather, the desegregation resolutions were premised upon the Board's admission that it and its predecessors, through various racially discriminatory pupil and faculty assignment policies and practices, had caused racial segregation in the public schools. Importantly, that admission was not proposed, in surprise fashion, for the first time on December 8, 1971. The Board had first admitted its responsibility in the resolution of April 29, 1971 setting up the Committee of 75. The Committee of 75, in its report, likewise found that the Board and its predecessors bore responsibility for the pervasive racial segregation in the Dayton system. In addition, the Board's liability had been determined earlier the same year in emphatic terms by the Ohio State Board of Education; and suggested even earlier, in 1969, by HEW. *See* pages 30-34, *supra.* Consequently, the Board's December 8, 1971 decision to desegregate the system was the considered product of determinations that affirmative remedial

their historic contribution to the current condition of segregation. *See* pages 27-29, *supra.* Moreover, as the district court found, the use of optional zones also serves "to destroy or dilute the neighborhood school" (A.13) defense asserted by the Dayton Board as the supposedly otherwise "racially neutral" cause of school segregation.

action was required to comply with the Board's constitutional obligations. When the new Board voted on January 3, 1972, to rescind this desegregation program and reinstate segregation across the board, it did more than simply make a different judgment about appropriate educational policy. It deliberately turned back the clock in a demonstrably segregative fashion. And it did so without offering any evidence to show that the uniform conclusions of HEW, the Ohio State Department of Education, the Committee of 75, and the 1971 Board and Superintendent of Schools, were either precipitous or incorrect. The rescission thus intentionally reimposed segregation on a system-wide basis. It was, *prima facie,* a purposeful act of racial discrimination infecting the entire system and again communicating a policy of segregation to all of the city's citizens. Whether or not the rescission viewed in isolation is unconstitutional under the Equal Protection Clause, in its total context it is, at a minimum, a significant element of plaintiffs' *prima facie* case.[52]

[52] Plainly, if the Board was under an affirmative constitutional duty to desegregate, as the court of appeals held in *Brinkman I* (A.55-56), the rescission of a desegregation plan was unconstitutional. *Cf. North Carolina State Bd. of Educ.* v. *Swann, supra.* While we agree with the court of appeals that, in this context, the constitutionality of the rescission standing alone need not be reached, we would argue, if necessary, that the rescission is unconstitutional without regard to the Board's affirmative duty to desegregate. *Cf. Nyquist* v. *Lee,* 402 U.S. 935 (1971), *aff'g* 318 F. Supp. 710 (W.D. N.Y. 1970) (three-judge court). The patent purpose of the rescission was to maintain racially segregated schooling. Moreover, the Board's rescission action singled out pupil reassignments for the purpose of desegregation and, with respect to such assignments, stripped the Superintendent of Schools of his otherwise unqualified state-law authority over intra-district student assignments. *See* note 30, *supra.* This was "an explicitly racial classification treating racial [pupil assignment] matters dif-

Were it necessary, we would have no reluctance in arguing that any one of the foregoing factors constitutes a *prima facie* case of system-wide intentional segregation shifting to the Board the burden of demonstrating at the time of trial that the condition of almost total pupil segregation was "adventitious." *Keyes*, 413 U.S. at 208. For purposes of this case, however, it is dispositive that the four factors taken together constitute such a *prima facie* case under *Keyes*.[53]

ferently than other . . . . [pupil assignment] matters." *Hunter* v. *Erickson*, 393 U.S. 385, 389 (1969). These facts are more than sufficient to "trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considertaions." *Washington* v. *Davis*, *supra*, 426 U.S. at 242. Nevertheless, we are content for purposes of this argument, to have the rescission treated as one of the elements of plaintiffs' *prima facie* case. As such, the other wide-spread practices of deliberate segregation conclusively show that the rescission was an act of system-wide intentional racial discrimination, and the rescission, in turn, compounds the harm of the other racial acts. Taken together, the four elements make a strong case for the conclusion that the Dayton Board had steadfastly pursued a long-standing plan of purposeful racial separation in all aspects of public schooling.

[53] In *Keyes* the Court applied considerations of "policy and fairness" in concluding that a burden-shifting principle is appropriate in racial segregation cases such as this, where plaintiffs prove a substantial amount of intentional segregation. 413 U.S. at 209, quoting 9 J. WIGMORE, EVIDENCE § 2486, at 275 (2d ed. 1940). We think this burden-shifting approach also finds ample support in the "ordinary rule" that a party has the burden of proving facts peculiarly within its own knowledge. *United States* v. *New York, N.H. & H.R.R.*, 355 U.S. 253, 256 n.5 (1957). The "northern" school cases, in general, fit this rule like a glove. While it is true that many of the relevant facts (e.g., construction of new schools, boundary changes) are "public" knowledge, it is also true that the segregative intent underlying these "public" facts is rarely above board. *See generally Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977). The

Plaintiffs' *prima facie* case here is considerably more powerful than that presented in *Keyes*, which consisted only of deliberate segregation in one portion of the city containing about 38% of the black students. Here we have shown that, in addition to the intentional segregation of a substantial majority of the students and virtually all of the faculty at the time of *Brown*, and in addition to the periodic discriminatory use of optional attendance zones effecting segregation in a substantial portion of the schools in the system, the Board engaged in two intentional acts of segregation having across-the-board impact: the assignment of faculty and staff on a segregated basis until at least the 1970-71 school year, and the 1972 rescission deliberately reinstating system-wide pupil segregation.

B. The Board Has Failed To Rebut Plaintiffs' *Prima Facie* Case

Plaintiffs' *prima facie* case thus raised two presumptions of intentional system-wide segregation. The first is that because the four *de jure* practices that comprise plaintiffs' *prima facie* case affected a substantial

inherent difficulty of meeting this legal standard, combined with the mismatch of resources (full-time, fuly-paid school board lawyers and professional staffs opposed to the limited resources of private plaintiffs, even those with the backing of civil rights organizations), imposes a greater burden on plaintiffs, even under a burden-shifting standard, than the ordinary civil litigant ever faces. Hence, when plaintiffs such as those here prove intentional discrimination with respect some meaningful portion of the school system, justice demands that the burdens of proof shifts to the school board. These points are not particularly urgent in the present case, because plaintiffs here have made out an overwhelming case of intentional system-wide segregation. We therefore make the points in this note to caution the Court against using this unusually strong case to set a standard that would be unrealistic for the many other cases in which system-wide racial discrimination can otherwise be proved to an acceptable degree of confidence.

portion of the system, these "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions" ordinarily sufficient to render the system dual. *Keyes*, 413 U.S. at 203, 213. To overcome this presumption, the Board must demonstrate that its four intentionally segregative practices were compartmentalized within "separate, identifiable and unrelated units" of the system so that in combination they affected less than the whole system. *Keyes*, 413 U.S. at 201-05, 213. If the Board fails in that burden, plaintiffs are entitled to comprehensive relief. *Keyes*, 413 at 213.

Should the burden just described be met, it is then incumbent upon the Board to dispel the second presumption: "there is high proability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system." 413 U.S. at 208. To meet this second burden, the Board must show clearly and convincingly that "segregative intent was not among the factors which motivated their actions." 413 U.S. at 210. If the Board fails to meet this burden, "all-out desegregation" is required absent a showing by the Board that such intentional actions "were not factors in causing the exsting condition of segregation." 413 U.S. at 214.[54]

[54] In *Keyes* the Court approvingly cited a number of lower court decisions holding that "in a school system with a history of segregation, the discharge of a disproportionately large number of Negro teachers incident to desegregation 'thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence.' " 413 U.S. at 209. We think "clear and convincing evidence" is the degree of proof required of a school board responding to a *prima facie* case consisting of a showing of intentional racial segregation with respect to a significant portion of the system.

Turning to the first of these burdens, *Keyes* counsels that the "cases must be rare" (413 U.S. at 203) where school authorities can show that the effects of a sub-

Such a school board should be put to a "higher degree of proof than applies in a negligence case." *Woodby* v. *Immigration & Naturalization Service*, 385 U.S. 276, 285 (1966). *See generally* C. McCormick, Law of Evidence § 320, at pp. 679-81 (1954); 9 Wigmore, Evidence § 2498 (3d ed. 1940); McBain, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242 (1944). A "clear and convincing" or "clear, unequivocal and convincing" standard of proof is especially appropriate where a constitutional right or human liberty is at stake. *See, e.g., Berenyi* v. *District Director*, 385 U.S. 630, 636-37 (1967); *Woodby* v. *Immigration & Naturalization Service, supra; New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285-86 (1964); *Costello* v. *United States*, 365 U.S. 265 (1961); *Nowak* v. *United States*, 356 U.S. 660 (1958); *Gonzales* v. *Landon*, 350 U.S. 920 (1955); *Schneiderman* v. *United States*, 320 U.S. 118 (1943). In employment discrimination cases, for further examples, the lower courts have uniformly required employers to respond to *prima facie* cases of systematic discrimination with "clear and convincing" evidence. *See, e.g., Day* v. *Mathews*, 530 F.2d 1083 (D.C. Cir. 1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 444-45 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 259-60 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1374-80 (5th Cir. 1974); *United States* v. *Chesterfield County School Dist.*, 484 F.2d 70, 72-73 (4th Cir. 1973); *Cooper* v. *Allen*, 467 F.2d 836, 840 (5th Cir. 1972).

Such a degree of proof is called for in cases such as the present one by "the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Washington* v. *Davis, supra*, 426 U.S. at 242 *See also Hunter* v. *Erickson, supra; McLaughlin* v. *Florida*, 379 U.S. 254 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967). While the "strict scrutiny" standard relates to the burden of justification, as distinguished from the burden of proof, we submit that exacting evidentiary requirements are essential to securing the constitutional interests protected by the "strict scrutiny" rule. Certainly, "the duty of prevailing by a mere preponderance of the evidence" (*Woodby, supra*, 385 U.S. at 285), is incompatible with that goal. Here plaintiffs have established, *prima facie*, an intentional sys-

stantial amount of intentional segregation "can be treated as isolated from the rest of the district." 413 U.S. at 213. Here, the Board did not and could not show that the virtually complete pupil and faculty segregation at the time of *Brown,* the racially segregative optional zones affecting more than a third of the schools at one time or another, the deliberate racial discrimination in the assignment of teachers and other professional staff for more than fifteen years after *Brown,* and the 1972 rescission and reimposition of system-wide pupil segregation were directed at "different areas of the school district [which] should be viewed independently of each other." *Keyes,* 413 U.S. at 208. The Board could not and did not show that these pervasive acts of intentional segregation were aimed at either geographic parts of the district or aspects of school administration which were "separate, identifiable and unrelated units." *Id.* at 203. This is

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tem-wide "racial classification." "Strict scrutiny" mandates that the Board must disprove that case by "clear and convincing" evidence. It is under just such a standard, we believe, that this Court has "never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of de jure segregation as to each and every school or each and every student within the school system." *Keyes,* 413 U.S. at 200.

If we are right about the Board's burden of proof, then we are clearly correct in saying that it is not legally possible for the Board to meet its burden. The "clear and convincing" standard requires the Board to demonstrate that it is "highly probably true" that the presumptions raised by plaintiffs' *prima facie* case are unfounded. *See,* McBain, *supra,* 32 CALIF. L.REV. at 254, 262-63. Since the court of appeals has determined that there are "serious questions" as to whether the Board's case with respect to the reserved isues (*see* note 46, *supra*) is "supported by substantial evidence" (*Brinkman I,* A.66-67), it follows, as a matter of law, that the Board cannot overcome plaintiffs' *prima facie* case with "clear and convincing" evidence.

not surprising in this compact district where the Board could make "no showing of the existence of conditions related to the topography of the Dayton area, location of natural or artificial barriers, geographic isolation or similar considerations" (A.121) which might hinder system-wide desegregation. The Board has failed to meet its burden. The existence of a dual system in Dayton is thereby established.

Even if the Board could overcome the first burden by showing that its intentional actions had effects limited to a separate and distinct portion of the system, the Board still did not meet its second burden of showing that segregative intent was not *one* of the factors underlying its other, ostensibly racially neutral practices. These practices include school construction and site selection, grade structure and reorganization, and pupil transfers and transportation. Although the district judge here, as in *Keyes,* generally found or implied that these other practices were racially neutral, it did so on the erroneous assumption that plaintiffs bore the burden of proof throughout. The court of appeals reserved decision on whether these other practices amounted to unconstitutional, intentional segregation in their own right. But it did review the evidence and determine that there are "serious questions" (A.66) as to whether the Board's claims of racial neutrality are supported by "substantial evidence." A.67. This determination makes it legally impossible for the Board to show that it is "highly probably true" that race played no part in these other practices. *See* note 54, *supra.*

Assuming *arguendo* that the Board bears a lesser degree of persuasion with respect to its second burden,

it could not meet it. The district court's conclusions concerning the use of optional zones demonstrate that "the 'neighborhood school' concept has not been maintained free of manipulation" by the Dayton Board. *Keyes,* 413 U.S. at 212. In the face of plaintiffs' *prima facie* case of intentional segregation, the Board had to show that its "neighborhood school" practices were part of "a consistent and resolute application of racially neutral policies" (*Oliver* v. *Michigan State Board of Education,* 508 F.2d 178, 182 (6th Cir. 1974)), rather than part "of a policy to create or maintain segregation in" the Dayton public schools. *Keyes,* 413 U.S. at 214. The Board's assertion of a racially neutral "neighborhood school" policy to justify its school-construction, grade-structure-reorganization, and pupil-transfer practices necessarily fails, because the segregative use of optional zones is so inconsistent with the defense. In the words of the district court, the optional-zone practices "destroy or dilute the neighborhood school concept" (A.13), and, with it, the Board's asserted non-racial explanation.[55]

Because of the Board's inability to meet its second burden, plaintiffs are also entitled to "all-out desegregation," unless the Board can show that its practices "were not factors in causing the . . . condition of segregation" which existed throughout the Dayton school district at the time of trial. *Keyes,* 413 U.S. at 214. No such showing was attempted or made below. In view of the Board's decision in 1972 to reinstate segregation system-wide and its refusal ever to take action to overcome the *de jure* segregation inherited at the time of *Brown,* the Board cannot show, under any evidentiary standard, "that a lesser degree of segregated schooling in the [Dayton public schools] would not have resulted even if the Board had not acted as it did." *Keyes,* 413 U.S. at 211. To the contrary, in view of the substantial contribution of the Board's various practices to the pattern of school segregation, it is undeniable that these past segregative acts were "factors" causing, creating or contributing to the segregated condition of the Dayton schools. *Keyes,* 413 U.S. at 211, 214.

In sum, the Board was not and is not able to show that the "pattern of intentional segregation" (*Keyes,* 413 U.S. at 210) was limited, isolated, or otherwise not a contributing factor to the extensive, across-the-board racial segregation of pupils present until this school year. The Board having failed to rebut plaintiffs' *prima facie* case, the lower courts had the duty, which they fulfilled, to "decree all-out desegregation" (*id.* at 214) of the Dayton public schools.

III. THE SYSTEM-WIDE DESEGREGATION PLAN ORDERED BELOW DOES NOT IMPOSE A FIXED RACIAL BALANCE AS A MATTER OF SUBSTANTIVE CONSTITUTIONAL RIGHT, AND THE PLAN CONTAINS NO OTHER IMPERMISSIBLE FEATURES.

The foregoing two arguments establish plaintiffs' right to a remedial plan of system-wide pupil desegregation to uproot the system-wide violation. That re-

[55] The Board's use of optional zones thus shows the inconsistent application of allegedly "neutral criteria" which must be viewed skeptically in evaluating asserted justifications for *prima facie* discriminatory conduct. *Cf. Shapiro* v. *Thompson,* 394 U.S. 618, 634-38 (1969). Here, as in *Keyes,* "the mere assertion of such a ['neighborhood school'] policy is not dispositive where, as in this case, the school authorities have been found to have practiced de jure segregation in a meaningful portion of the school system by techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation." 413 U.S. at 212.

solves the major dispute between the parties in this Court. However, the Board also raises two additional, general objections relating to particular aspects of the district court's remedial orders and to the impact of the plan itself. The first branch of the Board's claim is that the district court has ordered a "fixed racial balance" and that, although nowhere so stated by the courts below, the Board will be required to readjust attendance patterns every year in perpetuity in order to maintain such a balance. Pet. Br. at 27-30, 32-35.[56] Second, the Board argues that the plan approved below is impermissible on pragmatic grounds, apparently because the trend of white parents and children leaving the city of Dayton during recent years for reasons wholly unrelated to school desegregation will not cease under the desegregation plan implemented this school year. Pet. Br. at 35-37.

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[56] The Board also argues (Pet. Br. at 30-32) that the plan ordered below contravenes the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* This contention, as is at least part of the Board's "racial balance" argument (*see* note 57, *infra*), is based exclusively on the premise that there is no system-wide constitutional violation requiring a system-wide remedy. If the premise is wrong, as we have shown in Arguments I and II, *supra*, then the Board's claims under the 1974 Act fall with the premise. We do not understand the Board to contend otherwise in this Court, as they also did not in the courts below. In any event, 20 U.S.C. § 1702(b) expressly states that the 1974 Act is "not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." *Cf. Drummond* v. *Acree*, 409 U.S. 1228 (1972) (Powell, Jr., in Chambers); *Swann*, 402 U.S. at 16-18. The court of appeals in *Brinkman II* correctly construed the Act in accordance with its terms. A.95. The Board's constitutional and statutory arguments stand or fall together.

A. The Courts Below Did Not Order A Fixed Racial Balance Either For Now Or For Ever.

1. We have previously set out in full the relevant parts of the court of appeals' decision in *Brinkman III* (A.121-23) rejecting petitioners' "fixed racial balance" argument. *See* pages 53-54, *supra*. We think that disposition was correct in all respects.

After three rounds of evidentiary hearings the district judge had acquired considerable familiarity with the Dayton school system, and he had heard uniform testimony to the effect that Dayton was a relatively easy system to desegregate and that there were no major obstacles to system-wide actual desegregation. *See* pages 43-52, *supra*. His general directive that each school in the system should approximate the system-wide racial ratio, within plus or minus 15%, was therefore not an arbitrary, inflexible requirement arrived at in an uninformed vacuum. And it most certainly did not represent a determination that plaintiffs were entitled to have each school balanced to a fixed percentage as a matter of substantive constitutional right.[57] The district court provided that its "plus or

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[57] The Board correctly relies on *Milliken* v. *Bradley*, 418 U.S. 717 (1974), for the proposition that a judicially-perceived undesirable racial balance is not a substitute for an actual constitutional violation. Pet. Br. at 27-28. As we have shown in the previous two arguments, however, there is present here a system-wide constitutional violation calling for a system-wide remedy. Petitioners also criticize the district court's reference to a "constitutional right" of schoolchildren to "share equally all facilities of a school system, both the superior and the inferior." A.102. Whatever this means, and we think the court of appeals speculated as accurately as one can (A.122-23, and pages 53-54, *supra*), what the district court *ordered* was "actual desegregation" "to dismantle [the] dual school system." *Swann*, 402 U.S. at 22, 24. There is no indication that the language in question was anything other than another

minus 15%" requirement would not be applied to the 10th and 11th high school grades, and the orders provided that "where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis." A.104; *see also id.* at 106.

Against this background the "15% plus or minus" requirement was a valid guideline, and the burden was clearly on the Board to come forward with specifics if it thought the guideline was not workable with respect to either the system as a whole or to particular schools in the system. It is dispositive, in our view, that the Board has never—not in the district court, not in the court of appeals, and not in this Court—identified a single school or set of schools that could not be feasibly desegregated under the district court's guidelines. *See Swann,* 402 U.S. at 27-31. The Board also failed to come forward with a specific plan which attempted

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imprecise, off-hand statement characteristic, unfortunately, of the district court's opinions. As with other such imprecision or misunderstanding on the part of the district court, the court of appeals properly condemned any implication in this statement that might be read to create a right "which the federal courts have never recognized." A.122. The court of appeals faithfully adhered to this Court's admonition against ordering any particular degree of racial balance as a matter of substantive constitutional right. *Swann,* 402 U.S. at 24. The court below also carefully reviewed the proceedings, context and actual plan ordered to insure that the plan itself and the actual judgment were not infected by any such unconstitutional implication. A.121-123. The situation here is thus readily distinguishable from the one in *Spangler, supra,* where this Court found that an unclear but facially valid district court judgment became infected with an impermissible factor by a statement, made in the course of reinterpreting the judgment several years later, which imposed a fixed racial ceiling on the schools' pupil enrollments to be maintained "at least during [the district judge's] lifetime." 427 U.S. at 433.

to justify the maintenance of any one-race school or set of schools as being "genuinely nondiscriminatory." *See Swann,* 402 U.S. at 26. Instead the Board places sole reliance on its claim, refuted above, that there is no system-wide violation.

In *Swann,* this Court reviewed a similar district court order which directed "that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . [and] [t]hat pupils of all grades [should] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students." *See* 402 U.S. at 23. With respect to the Charlotte-Mecklenburg Board's argument that the district court there had imposed a "fixed racial balance" requirement, this Court noted: "The fact that no such objective was actually achieved—and would appear to be impossible—tends to blunt that claim. . . ." *Id.* The Court nevertheless recognized that the district court's language at issue there was susceptible to the construction urged by the Board, and the Court held: "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." *Id.* at 24. But the plan actually approved in that case provided only "that student bodies throughout the system would range from 9% to 38% Negro" (*id.* at 10); and the Board there, as the one here, had defaulted in its obligation to propose an acceptable plan, causing the district court there, as here, to designate Dr. Finger "to assist the District Court to do what the

Board should have done" *Id.* at 25.[58] This Court approved the order in these words (*id.*):

> We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances. . . . In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

The "15% plus or minus" *language* employed by the district court in the instant case is considerably more flexible than the "79-29" language employed by the district court in *Swann*. And the 30% total deviation allowed by the terms of the district court's order in this case is slightly greater than the 29% deviation contained in the *actual plan* approved by the district

[58] The Board's default and failure here are greater than that of the Board in *Swann*. As the court of appeals held in *Brinkman II*, the "free choice" plan proposed by the Board for yet another school year, 1975-76, did "not even purport to dismantle Dayton's one-race schools"; "the basic pattern of one-race schools will continue largely unabated." A.93. The Board's plan as implemented maintained 22 schools 90% or more black and 17 schools 90% or more white. A.588. In *Swann*, by comparison, "[t]he final board plan left 10 schools 86% to 100% Negro and yet categorically rejected the techniques of pairing and clustering as part of the desegregation effort." 402 U.S. at 24 n.8. As in *Swann*, therefore, the Board with its 1975-76 plan utterly failed to meet its burden, in view of the system-wide violation (*see* Arguments I & II above), "to satisfy the courts that [these virtually one-race schools'] racial composition is not the result of present or past discriminatory action on their part." *Id.* at 26. Further delay in fashioning an adequate remedy in light of the Board's default was surely not tolerable. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann*, 402 U.S. at 14.

court in *Swann*. Moreover, the actual plan implemented below pursuant to the district court's order has resulted in a much greater deviation than that approved by the Court in *Swann*. An October 14, 1976 report published by the Research Division of the Dayton Board's Department of Management Services (attached hereto as Appendix B), reveals that the plan as implemented contains the following maximum deviations: at the elementary level, the Webster school has the smallest proportional black pupil population at 30.2%, compared with the highest black pupil proportion of 75% at the Jackson primary, for a total range at the elementary level of 44.8%; at the high school level the comparable range is 29.1% black at Belmont high school to 72.4% black at Dunbar high school, for a total high school range of 44.3%.[59] This is not racial balance; it is typical desegregation. The Board's "fixed racial balance" argument is therefore devoid of both factual and legal merit.

2. The second prong of the Board's "racial balance" objection is that the courts below have imposed "a

[59] Excluded from these comparisons are some small schools (e.g., the 100% black Weaver school with 29 total pupils, the 9.7% black Gorman school with 93 pupils) which do not fit the normal enrollment patterns.

We observe from Appendix B what appears to be a continuing racial pattern in pupil assignments: most of the former all-black or virtually all-black schools remain predominantly white. One of the Board's own experts testified that such a pattern, which retains the former racial identity of the schools, would not constitute effective desegregation of the Dayton system. A.300. By defending in this Court the desegregation orders entered below, we do not intend to waive any proper objections that might be made to the plan *as implemented by the Board*. In accordance with the decisions of this Court, the district court has retained jurisdiction "until it is clear that disestablishment [of the dual system] has been achieved." *Raney* v. *Board of Education, supra*, 391 U.S. at 449.

fixed racial formula" that "is a permanent ratio so that adjustments of student assignments would be required each year as long as the system exists to maintain the ratio in each school." Pet. Br. at 34. Therefore, argues the Board, the plan approved below violates the strictures of this Court's decision in *Pasadena City Board of Education* v. *Spangler, supra.*

In *Spangler* this Court disapproved a district judge's remedial order requiring implementation of a plan under which "no majority of any minority" would be present in any school, which the district court had subsequently determined to mean "at least during [his] lifetime." *See* 427 U.S. at 433. This Court held that "in enforcing its order so as to require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school, the District Court exceeded its authority." *Id.* at 435.

No comparable provision or requirement has ever been entered by the district judge, nor contained or intimated in any statement ever made by him, in the instant case. The court of appeals scrutinized this record for language conflicting with *Spangler,* and could find none: "The short answer to this argument is that the judgment directs no changes after the 1976-77 school year." A.123. The court of appeals further directed: "If adjustments to this plan are sought by any of the parties in future years the district court will necessarily consider the limitations of *Spangler* in dealing with such requests." A.123. The Dayton Board's argument to the contrary before this Court is based on unfounded speculation and is incorrect.

B. The Board's Resegregation Argument Is Wrong.

The Board argues that the plan ordered below "will not work" because "[t]he record establishes that during the five years this case has been in the courts 11,000 white and 900 black students have left the Dayton system." Pet. Br. at 37. From there the Board leaps to the conclusion that the actual desegregation plan approved below will cause resegregation of the city's schools, and that such a plan should therefore not be approved. This is a specious proposition.

First, there is not a whit of evidence showing that the declining pupil population in Dayton over the years *prior* to this school year has had anything to do with school desegregation. *See* A.301. Such a showing is impossible, because prior to this school year there has been no meaningful school desegregation in the district. A.588-589.

Second, this Court has consistently rejected the argument that school desegregation should be limited in order to accommodate community hostility. The Court so held in *Brown II,* again in *Cooper* v. *Aaron,* 358 U.S. 1 (1958), and most recently in *Monroe* v. *Board of Commissioners, supra.* Here, as in *Monroe,* the Board's argument "reveals its purpose. We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether." 391 U.S. at 459. In *Monroe,* the Court answered that argument (*id.*) by quoting *Brown II,* 349 U.S. at 300: "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." The Dayton Board should be given the same answer.

Finally, it is important to recognize what the Board's argument is not. It is not the Board's position, for example, that a different but equally effective plan of system-wide pupil desegregation would be more acceptable to the community and would result in greater actual desegregation than the plan approved below (which the Board was allowed to implement in any fashion it chose so long as actual pupil desegregation occurred). And it is not the Board's position, for further example, that a different but equally effective desegregation plan could be devised that would minimize the non-school causes for the residential flight from Dayton proper to its suburbs. Whether or not judicial consideration of "white flight" in either of those circumstances, or in similar circumstances, would be permissible, is thus not before the Court in this case. Rather, the Board's argument simply is that the judgment below should be set aside because of speculation that a demographic trend which started when the schools were segregated will continue under the school desegregation plan ordered below. That demographic trend is regrettable, in our judgment, but it is a problem with which federal judges are not required to deal in the context of a school desegregation case. What they can and must deal with, however, is unlawful school segregation. The judges below have done that: they are due to be affirmed, and the Board's "it won't work" objection (belied by the figures in Appendix B, attached hereto) is due to be rejected.

IV. PLAINTIFFS HAVE STANDING TO BRING THIS CASE IN THEIR OWN RIGHT AND AS REPRESENTATIVES OF THE CLASS.

After "five years of litigation" of a clearly adversary nature between very real parties in interest, petitioners argue that this school desegregation case should be dismissed without further ado because the named plaintiffs are "curious bystanders" who have no stake in the outcome of this litigation. Pet. Br. at 38. Petitioners' charge goes too far. There must be very few, if any, school cases in which the record of the local black community's challenge to intentional segregation of their public schools has been any longer or more open and unrelenting. *See, e.g.,* A.358-59 (PX. 9), 456-57 (PX. 13A), 459-61 (PX. 13N). And probably in *no* school case has there been as much testimony from as many "eyewitnesses" to and "victims" of the *de jure* segregation practices of their local school board. *See, e.g.,* A.181-191, 197-199, 200-208, 208-215, 220-221, 221-223, 238-240, 290-291; R. I. 352-384, 536-563, 741-750, 795-817. *Cf. Smith* v. *Board of Educ.,* 365 F.2d 770, 777 (8th Cir. 1966) (Blackmun, J.). Petitioners' suggestion that these courageous Dayton citizens are an "anonymous collection" who have no more standing to bring this suit than "to file a similar law suit against every school board in the United States" (Pet. Br. at 39) is not credible.

As a matter of law, petitioners' procedural claim is also wrong. As with some of the other issues raised by petitioners, however, resolution of this claim may appear somewhat more difficult than it really is, due to the nature of the proceedings below. In summary, named black and white plaintiffs, 6 parents and 13

children, filed their complaint on April 17, 1972, alleging that they "are parents or minor children thereof attending schools in the Dayton public school system" who seek a racially non-discriminatory system of public schooling "on behalf of themselves and others similarly situated." Complaint, ¶ 2. The succeeding paragraph of the complaint made general class-action allegations under Rule 23, FED. R. CIV. P. On July 24, 1972, petitioners (the Board and four of its members) filed their answer specifically responding to some of the complaint's allegations (but not the one in question), and generally denying "each and every other allegation contained in the complaint of plaintiffs." Answer, ¶ 5. On July 24, 1972, three defendant board members filed an answer generally admitting the allegations of plaintiffs' complaint. Prior to trial the parties submitted briefs on the standing and class action issues. On November 13, 1972, the defendant Superintendent of the Dayton public schools filed his answer and, "based upon a search of the records of the school system, personal recollection and staff information," admitted the allegations.

During the November 1972 evidentiary hearing many black school administrators, teachers and parents, some with children in the Dayton public schools (e.g., R. I. 361, 370-373), testified on behalf of plaintiffs to their personal injury from and challenges to the Dayton Board's racially discriminatory policies and practices beginning as early as 1912 and continuing through the date of trial. No named plaintiff testified; however, the Board offered no proof from the records within its possession, or otherwise, to rebut its Superintendent's admission (based upon his search of

the school district records) to named plaintiffs' allegations concerning their status in the Dayton public schools.

In its February 7, 1973 decision, the district court determined: "[t]his is a school desegregation suit brought as a class action by the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education." A.1. In the face of this determination adverse to their position, the Dayton Board claimed on its appeal, *inter alia*, that plaintiffs had failed to show any stake in the controversy sufficient to maintain the action on behalf of themselves or the class of black school children in Dayton, Ohio. Although the court of appeals did not separately discuss the issue in *Brinkman I*, it held that "all contentions of the parties contrary to the conclusions reached in this opinion have been carefully considered and are found to be without merit." A.69. The Board did not petition this Court for review of that judgment. On remand to the district court, on plaintiffs' second appeal to the Sixth Circuit in *Brinkman II*, on the Board's first petition for review in this Court, or further proceedings pursuant to the second remand to the district court, and on the Board's appeal to the Sixth Circuit in *Brinkman III*, the Board never again raised any claim that plaintiffs lacked standing to maintain this action on behalf of themselves or the class.

We recognize that the law of the case is a discretionary rule subject to modification in the interests of justice, particularly in this Court (*see generally* 1B MOORE'S FEDERAL PRACTICE ¶ 4.04 (2d ed. 1974)), and we recognize that standing, in its "case or contro-

versy" dimension, is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth* v. *Seldin,* 422 U.S. 490, 498 (1975). But there is no reason at this late date to set aside the final determination by the district court and the court of appeals in *Brinkman I* that plaintiffs have standing to bring this action in their own right and as class representatives. The parties (including the plaintiffs) and the courts below have relied on this determination, and the Board has not since controverted it until now. It would be a manifest injustice to hold that plaintiffs do not have standing to maintain this action merely because they relied on the lower courts' final determination in *Brinkman I,* rather than seek to reopen the record to supplement the proof in prescient anticipation of an issue to be raised in a future petition for certiorari.

In contrast, the Board has offered no affirmative reason why it should not be bound by the *Brinkman I* determination on the issue, after choosing not to seek review in this Court and never again raising the issue below. *Cf. Pasadena City Bd. of Educ.* v. *Spangler,* 427 U.S. at 432.[60] Surely these circumstances adequately explain why the courts below have provided "no explanation of just why this contention of the Dayton Board is without merit. . . ." Pet. Br. at 38. This explanation is especially adequate since the original decision on plaintiffs' standing in *Brinkman I* was supported by the defendant Superintendent's unrefuted judicial admission of plaintiffs' status based

[60] In *Spangler* this Court noted that "de do not have before us any issue as to the validity of the district court's original judgment, since petitioners' predecessors did not appeal from it." 427 U.S. at 432.

on his search of the school system's records (*cf.* Rule 801(d)(2), FED. R. EVID.), and since the interest of the plaintiff class in the controversy was shown by such extensive testimony to be "real and immediate," not "conjectural" or "hypothetical." *Cf. Sosna* v. *Iowa,* 419 U.S. 393, 403 (1975).

In any event, in order to resolve all possible doubts at this juncture, the first time and the first court where the issue has been controverted by petitioners since they chose not to seek review from the *Brinkman I* decision, we have filed with the Court affidavits of the parents of 11 of the named plaintiff children. The parents affirm that all 11 children were students in the Dayton Public Schools at the time of the filing of this action and that six of them still attend the Dayton public schools, five having since graduated.[61] Under *Spangler,* 427 U.S. at 430, named plaintiffs therefore have standing to maintain their action to secure a racially unitary system of public schooling in Dayton, Ohio, regardless of whether the district court's determination of the class is as definite as one might wish under Rules 23(c)(1) and (c)(3), FED R. CIV. P. *Cf. Board of School Commissioners of City of Indianapolis* v. *Jacobs,* 420 U.S. 128, 130 (1975).[62] Unlike

[61] For example, as set forth in the March 27, 1977 affidavit of plaintiff C. R. Walker, Jr., a black citizen of these United States, his three plaintiff children at the time of trial attended the Weaver school, one of the "mixed" schools converted in the West-Side Reorganization. *See* pages 16-18, *supra.* His children now attend the McFarlane elementary school, which this school year is not a 100% black school for the first time in its long history since opening in 1932 as the blacks-only Dunbar school.

[62] The need for precision in the definition of the class in this case is not as great as in *Jacobs,* 420 U.S. at 130, because there is considerably less likelihood of mootness. The issue here concerns

the *Spangler* circumstances, named plaintiffs still in the Dayton public schools have a sufficiently personal stake in this litigation to maintain the action, even if

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the system of intentional segregation from which plaintiff children may suffer immediate and continuing constitutional injury for up to 13 school years or more, not school authorities' periodic infringement on particular high school students' free-speech rights. Moreover, unlike *Spangler* where named plaintiffs sought to desegregate only high schools (*see* 415 F.2d 1242 (9th Cir. 1969)), the complaint here prayed for system-wide relief without limitation; therefore, the Board understood from the beginning of this action that the plaintiffs sought to eradicate *de jure* segregation and racial discrimination from all aspects of the Dayton public schools. In any event, the district court's determination of the class as "the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education" (A.1) is sufficiently definite and comprehensible within the contemplation of Rule 23. *See* Notes of the Advisory Committee on 1966 Amendments to Rule 23, 3B MOORE'S FEDERAL PRACTICE, at pp. 23-28. Finally, because this case has *not* been mooted by the graduation of the individual plaintiff children and the controversy therefore does continue between named plaintiffs still in the Dayton public schools and the petitioners, any deficiency in this class determination can be cured, either by this Court or the courts below under their continuing jurisdiction of the case. *Cf.* Rule 23(c)(1); *Senter* v. *General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976); *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40, 51 (5th Cir. 1974), *cert. granted*, 44 U.S.L.W. 3670 (U.S. May 24, 1970).

Of course, school desegregation cases are appropriately maintained as class actions; they are the *archetype* for Rule 23(b)(2) actions. *See* Notes of the Advisory Committee on 1966 Amendments to Rule 23, *supra*. But even a single school-attending child or his parent, black or white (*see Whitely* v. *Wilson City Bd. of Ed.*, 427 F.2d 179 (4th Cir. 1970); *cf. Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Barrows* v. *Jackson*, 346 U.S. 249 (1953)), surely has standing to maintain this action to root out official racial discrimination throughout the Dayton public schools. This is so because the individual plaintiff's right is not to attend a particular school but rather to "a racially non-discriminatory system of schooling." *Brown II*, 349 U.S. at 301. That is, "to attend schools which, near or far, are free of governmentally imposed ra-

some may think that their older brothers and sisters who have graduated since the filing of this lawsuit do not. To the end of this litigation, then, there must unfortunately be, and there is, a controversy between plaintiffs and the Board over the Fourteenth Amendment rights of black schoolchildren in Dayton, Ohio.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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cial distinctions . . ."; the individual plaintiff's school desegregation action is directed at the "system-wide policy of racial discrimination." *Potts* v. *Flax*, 313 F.2d 284, 288-290 & n.4 (5th Cir. 1963).

APPENDIX

APPENDIX A

Here we summarize the evidence relating to the Dayton Board's policies and practices in the areas of (1) school construction, closing and site selection, (2) grade structure reorganization, and (3) pupil transfers and transportation. With respect to these items, the court of appeals in *Brinkman I* determined that plaintiffs "have raised serious questions" as to the district court's failure to include these practices "within the cumulative violation." A.67. For reasons set forth in the main part of this brief (*see* notes 46 & 14, *supra*), we do not think these questions need to be answered in order to sustain the judgment below. We present this Appendix if we are wrong in our view of the case, in which event the Court may wish to address these reserved issues instead of remanding for consideration by the court of appeals in the first instance.[1]

1. School Construction, Closing and Site Selection

The Board's school-construction, school-closing and site-selection policies and practices over the past two decades failed to alleviate the condition of state-imposed segregation extant at the time of *Brown*. To the contrary, the Board's policies and practices in these areas impacted the dual system and literally sealed it in. In the period of expansion of the school system from the late 1940's to the mid-1960's, the overwhelming majority of new schools and

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[1] The Board's representation that plaintiffs on the prior appeals "begged" the Sixth Circuit to decide these reserved issues because we "have long since recognized that the only way to avoid the conclusion that the remedy is disproportionate to the wrong and therefore inequitable" (Pet. Br. at 27), is not accurate. We did, however, suggest that a decision on the independent unconstitutionality of the practices discussed in this appendix is the surest way to put permanently to rest the Board's incessant objections to a system-wide remedy. But we have never intimated, nor do we now intimate, that plaintiffs' right to system-wide relief depends on the disposition of these reserved issues.

additions to schools were located by the Board in either virtually all-black or virtually all-white areas, and attendance boundaries were drawn or maintained so that new schools and expansions of existing facilities opened as virtually one-race schools. A.241-246, 277-78. Of 24 new schools constructed between 1950 and the present, 22 opened 90% or more black or 90% or more white. A.242, 316-17 (PX4). During the same expansion period, additions to existing facilities followed the same pattern. 78 of some 86 additions of regular classroom space, for which racial compositions are known, were made to schools 90% or more one race at the time of the expansion; only nine additions were made to schools less than 90% black or white. A.277-78. The race-oriented nature of these practices is made crystal clear by the coordinate assignment of professional staffs to these schools and additions tailored to the racial composition of the pupils. A.316-17 (PX4); A.275; R.I. 1824-26, 1860.[2]

A few examples will suffice to illustrate the racial underpinnings of this complex process. For example, in 1962 the Willard and Garfield schools, previously designated for blacks only, were closed and the old blacks-only Dunbar high school building was converted into McFarlane elementary. Most of the children from the Willard and Garfield attendance areas were simply assigned to the McFar-

[2] Plaintiffs' expert, Dr. Gordon Foster, testified that such school construction patterns "by and large . . . took the place of changing zone lines in terms of maintaining existing racial patterns and compacting them" A.285. Mr. Bagwell, the Dayton Board's chief rebuttal witness with respect to school construction, admitted that "in effect then, when you . . . put an addition to a school, that as far as that space is concerned, you determine the boundaries and they are coextensive with the original boundaries of the school. . . . So that if a school is already 100 percent black and you are making an addition to that school, you in effect have determined the boundaries to be . . . creating a hundred percent black school unit." A.288. The same is true with respect to the virtually all-white or all-black primary units, as well as one-race additions. A.249-50.

lane school which opened, certainly to no one's surprise, with an all-black pupil population and an all-black faculty. Some children from the Willard and Garfield areas were also assigned to the all-black Irving and Miami Chapel elementary schools. At the same time, a newly constructed Dunbar high school, located in a black neighborhood at the fartherest corner of the school district away from substantial white residential areas, opened with a virtually all-black student body and faculty. *See* Statement, *supra*, at note 10. Thus, a major new element was added to the dual system and, although there was some juggling within, the color line remained basically intact.

Another example of a lost opportunity to accomplish desegregation occurred upon the closing of the Central school in the mid-1960's. The boundaries of the schools on the east side of Central were basically preserved with the result of maintaining the white identity of those facilities. Boundaries for an all-white school in the north were extended south to take in the northern half of the old Central zone in a proverbial "dog leg" which took in only the white areas of the zone. An area in the south end of the old Central zone containing a small black population was made an optional area, which crossed the river, between the virtually all-black Irving school and the all-white Emerson school. PX49 (1965 attendance zone overlay); PX46C (1960 census map).

A final example, presenting the converse of the above examples, relates to the Board's failure to utilize excess capacity to the maximum efficiency as pupil populations declined by over 10,000 following their peak year in the mid-1960's. Even conservative estimates at the time of trial indicated that the Board could have closed down 9 or 10 average-size elementary schools. A.246-47, 489-98 (PX56). Such closings would have presented the Board with substantial opportunities to accomplish significant savings in costs, and at the same time accomplish substantial deseg-

regation.[3] But rather than closing selected black and white schools and reassigning pupils to accomplish actual desegregation, the Board elected the more costly segregative option of keeping these under-utilized schools open and maintaining their racial identity.

2. Grade Structure and Reorganization

As previously noted, the Board persistently refused to alter grade structures by pairing schools to accomplish pupil desegregation. *See* Statement, *supra* at pp. 29-30. Likewise, the differential grade structure involved in the construction of primary units, and the grade organizations of the Dunbar high school (prior to 1962) and the Patterson high school (prior to 1968-69 school year) have perpetuated and compounded school segregation. *See* Statement, *supra,* at notes 10 & 22.

The Board acted in similar fashion in the 1971-72 school year when it reorganized the grade structures of some 20 elementary schools from K-8 to K-5, 6-8. This grade reorganization program presented an important opportunity for the Board to accomplish substantial desegregation by judicious selection of sites, alterations of feeder patterns, and the establishment of the new attendance zones for both the middle (6-8) and elementary schools (K-5) affected. A.376-87 (PX10). Yet, in the face of recommendations from the State Department of Education of alternatives for accomplishing substantial desegregation, and the development of a pupil locator map so that there

[3] There would be substantial cost savings with repect to such closings, even if substantial pupil transportation were required to accomplish school desegregation conveniently and safely for the children. According to the Board, the average yearly per pupil transportation cost on Board-owned buses is $50.00, while the average yearly per pupil cost for simply maintaining a pupil space in a school is $140.00. (Nos. 33 & 33A of plaintiff's Requests for Admissions (served October 13, 1972), admitted by both the Board and the Superintendent and Board minority.)

could be no doubt about the racial impact of its actions, the Board implemented a plan which reimposed segregation at three middle schools and their feeder elementaries, increased racial segregation at another middle school, and accomplished some desegregation at the fifth middle school. A.453-54 (PX12). The Board's actions thus resulted in "increasing or maintaining segregation as opposed to availing the opportunity of decreasing it." A. 276. The Ohio State Department of Education was of a similar view; it notified Dayton school authorities that the middle school reorganization program "has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren." A.454 (PX12).

3. Pupil Transfers and Transportation

Prior to the West-Side Reorganization in 1952 (*see* Statement, *supra,* at pp. 15-18), the Dayton Board regularly transferred (and provided transportation where necessary to) white children from the attendance areas of black schools, past or away from other all-black schools to "whiter" schools. R.I. 1953-55. And thereafter, the Board utilized optional zones to provide white children with an equally effective means of transferring out of the core black schools to "whiter" schools. *See* Statement, *supra,* at note 12. And the city-wide Dunbar and Patterson high schools operated in similar fashion. *See* Statement, *supra,* at notes 10 & 22.

In addition, curriculum, hardship and disciplinary transfers have functioned in many instances to assign white children from black schools to "whiter" schools. R.I. 807-10, 696; A.218-19. Two prime examples are the use of curriculum transfers by white students under the Freedom of Enrollment plan (A.218-19), and the emergency transfers of students in 1969 involving the Roth and Stivers high schools. A.272, 469-70, 474. This latter incident takes on additional significance because it occurred

in connection with the only time prior to trial that the Board redrew an attendance boundary to accomplish desegregation. This was accomplished by adding some of the all-black Roosevelt and Dunbar attendance areas to the predominantly white Stivers high school. R.I. 1253, 1255-57. In the very first year following this realignment, racial problems at Stivers, as well as at the predominantly black Roth, led to the transfer of 34 black students out of Stivers to the all-black Dunbar or Roosevelt schools, and 36 white students out of Roth to the virtually all-white Meadowdale, Stivers, Kiser and Fairview high schools. None of the white children transferred were assigned to black schools; and none of the black children transferred were assigned to white schools. R.I. 1259-66.

Overall, hardship, emergency and special education transfers were also carried out in such a way as to reflect and reinforce the underlying racial duality in pupil assignments. A.273. During the 1972-73 school year, for example, 266 (or 70%) of the 377 black children transferred were assigned to black schools, and 155 (or 91%) of the 171 white children transferred were assigned to white schools. A.379-80 (PX16F).

Throughout the post-*Brown* period, non-resident pupils attending the Dayton system on a tuition basis were assigned in a similarly racially dual fashion: white pupils were assigned to white schools (A.231-32), and black pupils were assigned to black schools. A.201. The assignment practices relating to several hundred white high school pupils from Mad River Township, who attended the Dayton system on a tuition basis throughout the 1950's, is illustrative. These students were assigned to the virtually all-white Stivers, Kiser, Wilbur Wright, and Belmont high schools. When the Board felt there might be capacity problems at the schools, the Board did not consider assigning these non-resident pupils to the black Dunbar, Roosevelt or Roth high schools, which had ample space.

Instead, the Board notified the Mad River Township school district that space would be unavailable for these tuition pupils in the 1960's. A.231-33, 475; R.I. 1928-31. In all of the various forms of pupil reassignment, it was the unbroken practice of the Board *never* to reassign white pupils to identifiably black schools. A.232.

An additional, classical segregative technique utilized by the Dayton Board was "intact" busing. There are two examples. First, in 1963 white children from the Ruskin school were transported intact (i.e., teacher and class as a unit) into separate one-race classes at the racially mixed Central school. R.I. 586-87. The second instance occurred in 1968 when the black Edison School was partially destroyed by fire. These black children were transported to a number of white schools throughout the city. But they remained as segregated as if they had been transferred to all-black schools, because they were accommodated in the white transferee schools in separate intact classes. A.201-03; R.I. 1069-71.[4]

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[4] Significantly, intact busing was not the Board's first alternative with respect to reassigning the Edison children. As Assistant Superintendent Harewood, the first black in the Board's central administration, recounted the incident, the first proposal under consideration was to house these black children in neighborhood churches. This proposal was abandoned only under pressure from Mr. Harewood, who pointed out that there were vacant classrooms in other schools in the city. Then, without further consultation with Mr. Harewood, the decision was made to transport self-contained black units into the white schools. A.201-02; R.I. 582-84. The next Fall, the new Superintendent of Schools ordered that the "intact" aspect of these reassignments be terminated. Upon later examination however, he found that the black children were still being segregated within the white schools under somewhat more subtle "tracking" procedures, and he again ordered that the children be fully integrated. R.I. 1071-72. Thus, only through pressure from a new Superintendent and from Mr. Harewood was the "intact" brand of racial discrimination terminated, and the Edison children integrated into the white schools to which they had been reassigned. Also at this time, predominantly

Thus, for several decades Dayton school authorities have transported children for a variety of reasons. But, with only a few hard-fought exceptions, children have never been transported in such a fashion as to accomplish desegregation; with singular consistency, the Dayton Board's transportation practices have maintained, reinforced and/or exacerbated racial segregation.[5]

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black groups of children from the over-crowded Jefferson school were assigned by non-contiguous zoning to a number of white schools. R.I. 848, 850; PX 122. These small amounts of actual, although only one-way, desegregation were short-lived, however. Instead of expanding the use of these desegregative alternatives, the Edison and Jefferson reassignments were terminated for the 1971-72 school year and the black children were resegregated into the rebuilt black Edison school (and by then, the black McFarlane middle school), and the black Jefferson school. A.231. The segregative effect of these reassignments is shown by the following chart comparing the percentage black of the receiving white schools (*see* PX 122) in the 1970-71 school year to that existing in the 1971-72 school year:

School	*% Black 1970-71*	*% Black 1971-72*
Ft. McKinley	9.6	1.6
Loos	9.5	6.0
Horace Mann	11.1	0.7
Shiloh	7.4	0.9
Shoup Mill	13.9	1.4
Velerie	20.0	13.5

[5] Although transportation has been used only twice (*see* note 4, *supra*) for desegregation purposes, pupil transportation has not been an uncommon event in Dayton. For many years white children in the far northwest, northeast and southeast areas of the system were transported to white schools in those areas (A.230-31), and, of course, black orphan children were transported all the way across town to the all-black Garfield school (*see* Statement, *supra,* at note 7.)

Ohio law requires that local school authorities make transportation available, and the Dayton Board so acts, for students who are assigned to schools beyond a prescribed distance from home. A.228, 289.

Finally, the Board's Freedom of Enrollment policy, as it existed at the time of trial, was, at best, a washout as a desegregative technique. Under this policy, students residing in an attendance area were given first priority to attend that school; second priority was given to students requesting transfer to a school for a specially available course; and the third priority was given to children requesting transfers and whose enrollment would improve the racial balance in the receiving school. A.466-67 (PX 16B). The first priority merely froze in the pattern of segregation which began two-thirds of a century ago. The second priority actually contributed to school segregation because it was used by whites to transfer from black schools to white schools. A.218.[6] Under the third priority, 459 black children transferred in the 1972-73 school year to white schools, thereby accomplishing some actual desegregation; but only one white child, formerly in a parochial school matriculating into a 54.3% black high school, made a racial balance transfer. A.478 (PX16D), 273. Hence, transfers under the Freedom of Enrollment policy were exclusively one-way—i.e. some blacks and some whites transferring to white schools—and had a negligible if not retrogressive impact on the racially dual pattern of pupil attendance.

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[6] In the 1972-73 school year, for example, 22 of 23 white students transferring under the Freedom of Enrollment policy were transferred to white schools. A.478 (PX 16D).

APPENDIX B

ETHNIC ENROLLMENT BY SCHOOLS

Dayton Public Schools
October, 1976

School	Total Enrollment								% Black							
	1963-64	1969-70	1971-72	1972-73	1973-74	1974-75	1975-76	1976-77	1963-64	1969-70	1971-72	1972-73	1973-74	1974-75	1975-76	1976-77
Jane Addams	600	668*	578*	541*	530*	515*	472*	452*	41.6%	78.7%	81.7%	78.7%	86.6%	88.9%	90.5%	58.2%
Allen	574	668	629	622	606	566	576	504	0.6	0.1	0.6	0.6	2.3	2.1	2.4	36.9
Belle Haven	1180	1091	994	871	928	885	876	956	0.0	5.7	10.3	17.7	26.6	33.2	39.0	48.4
Belmont Elem.	794	635	542	554	527	522	520	380	0.0	0.0	0.0	9.4	10.4	7.5	9.0	43.2
Brown	1177	1130	1067	980	1046	1009	976	865	0.5	0.8	1.0	2.2	2.9	2.9	5.4	49.4
Carlson	244	626	574	519	500*	489*	467*	440*	95.9	99.7	99.5	99.0	98.4	100.0	99.8	65.9
Cleveland	1180	1335	1246	1150	1119	1109	1038	819	0.0	0.1	0.3	0.8	0.9	0.6	0.6	44.3
Cornell Heights	890	894	784	800	767	743	722	563	0.0	59.1	72.3	80.5	86.7	88.8	92.7	59.0
Drexel	700	679*	601	597	551	543	540	398	3.5	4.3	6.5	8.2	9.1	7.6	6.3	42.2
Eastmont	950	792	607	542	527	470	520	425	0.0	0.0	0.0	0.7	0.9	1.1	19.4	42.1
Edison	800	532*	645*	603*	525*	692*	593*	548*	80.0	98.3	99.7	99.7	99.2	99.9	99.3	62.2
Emerson	1000	992*	816*	749*	685*	567*	520*	317*	0.0	13.6	5.6	8.9	10.1	12.2	10.6	38.5
Fairport	780	877	841	748	778	878	866	925*	0.0	4.6	39.7	59.1	78.1	85.2	89.8	61.2
Fairview Elem.	667	811	741	734	753	758	679	847	1.0	3.7	7.4	14.6	22.2	25.3	31.8	48.9
Ft. McKinley	510	473	451	425	—	—	—	—	0.0	2.5	1.6	2.6	—	—	—	—
Franklin	691	862	632	584	560	565	520	604*	0.0	0.0	0.0	0.3	0.4	0.5	0.0	39.2
Gardendale	176	282*	553*	554*	519*	532*	504*	295*	7.9	43.3	72.3	78.9	80.0	82.7	83.9	59.3
Gettysburg	630	632	598	576	609	590	558	516	0.0	6.6	14.5	22.7	37.4	51.2	57.7	63.6
Grant	917	699	649	610	552	533	475	415	0.0	0.9	0.6	0.3	0.7	0.6	0.6	47.0
Grace A. Greene	715	555*	579*	453*	338*	—	—	—	89.5	97.5	96.5	96.2	100.0	—	—	—
Hawthorne	316	263	329*	275*	262*	—	—	—	0.0	0.0	30.1	28.0	33.2	—	—	—
Hickorydale	565	487	432	471	513	521	520	454	0.0	10.3	15.5	32.5	44.2	54.1	61.9	69.2
Highview	807	812*	710*	635*	554*	440*	355*	561*	82.0	98.2	97.9	96.7	96.0	94.3	93.5	63.3
Huffman	834	1022	899*	775*	722*	662*	638*	513*	0.9	3.4	0.1	0.1	0.3	0.3	0.6	32.0
Irving	1035	749*	780*	656*	525*	399*	382*	—	96.6	100.0	99.5	99.2	99.8	99.2	99.0	—
Jackson Elem.	1147	785	726	692	607	551	506	276	98.5	99.5	99.4	99.9	99.7	99.3	99.2	53.6
Jackson Prim.	537	707*	677*	630*	596*	547*	485*	316*	96.2	99.2	99.1	99.7	99.5	99.8	99.2	75.0
Jefferson Elem.	1284	841	860	807	720	688	590	568*	1.2	80.3	91.3	94.9	96.1	96.1	96.9	52.1
Jefferson Prim.	—	661	719	724*	735*	668*	693*	550*	—	72.0	88.0	93.5	94.7	96.4	97.5	70.2
Kemp	725	631	568	515	452	467	472	436	0.0	0.0	7.2	7.0	7.5	8.1	8.5	45.9
Lewton	600	543	471	451	418	422	393	303	0.0	0.0	0.4	5.8	10.0	8.1	6.4	36.0
Lincoln	1145	1019	966	885	866	863	775	654	0.0	0.2	1.0	0.6	0.1	0.2	0.5	32.4
Longfellow	850	991	838	875	826	758	739	686	5.8	50.2	60.7	64.1	69.9	72.3	74.6	66.0
Loos	785	719	631	606	633	639	592	470	1.9	5.0	6.0	5.8	5.2	6.7	8.1	47.7
MacFarlane	1229	1222*	921	772	658	633	527	858	99.6	99.9	99.5	99.6	100.0	100.0	99.8	54.7
Horace Mann	435	355	284	255	236	218	249	213	0.0	7.0	0.7	3.1	5.5	4.1	27.3	54.9
McGuffey	925	858	850*	774*	662*	620*	629*	721*	0.0	18.9	32.0	41.6	47.9	55.6	60.9	34.5
McNary	—	498	423*	409*	412*	410*	360*	337*	—	98.8	100.0	100.0	100.0	100.0	99.7	69.1

School	Total Enrollment 1963-64	1969-70	1971-72	1972-73	1973-74	1974-75	1975-76	1976-77	% Black 1963-64	1969-70	1971-72	1972-73	1973-74	1974-75	1975-76	1976-77
Meadowdale Elem.	930	671	522	508	754	706	691	768	0.0%	12.8%	8.2%	12.6%	12.3%	10.6%	13.0%	58.6%
Miami Chapel	793	722	481*	410*	398*	380*	500*	610*	99.6	99.6	100.0	99.8	100.0	100.0	79.4	67.4
Patterson/Kennedy**	650	603	619*	726*	659*	586*	563*	466*	0.0	0.0	0.3	4.0	3.8	3.8	5.9	47.0
Residence Pk. Elem.	1112	746	702	660	654	592	536	437	80.0	99.2	99.7	99.8	99.5	98.5	98.5	60.0
Residence Pk. Prim.	—	383	449	457	411	357	342	286	—	99.5	99.8	100.0	99.5	99.4	98.5	70.6
Ruskin	1171	927*	834*	756*	733*	741*	714*	682*	0.0	4.3	0.1	0.5	0.1	0.5	0.4	52.2
Shiloh	490	645	550	537	548	486	442	284	2.4	6.0	0.9	8.4	14.2	15.4	17.4	53.9
Shoup Mill	318	336	207	184	—	—	—	316	0.9	13.4	1.4	3.8	—	—	—	62.3
Louise Troy	781	724*	592	567	530	504	467	507	99.8	99.7	99.7	99.1	100.0	100.0	100.0	71.8
Valerie	—	483	342	375	452	442	415	403	—	17.4	13.5	24.0	30.3	35.5	42.2	55.3
Van Cleve	770	780	760*	754*	634*	887*	842*	782*	0.9	1.7	14.9	20.2	19.6	28.4	31.5	51.2
Washington	650	703*	634*	628*	575*	576*	534*	418*	23.0	16.6	14.5	15.3	15.5	16.5	15.4	50.2
Weaver	1260	1118*	1001*	838*	605*	524*	457*	29*	98.8	100.0	99.7	99.5	100.0	99.6	99.8	100.0
Webster	531	537	493	502	527	551	547	540*	0.1	0.6	0.4	1.0	1.3	5.6	4.8	30.2
Westwood	1900	1467*	1318*	1190*	1008*	955*	877*	801*	94.7	99.5	99.5	99.7	99.5	99.5	99.5	68.5
Whittier	925	801*	748	615	576	533	408	643*	95.6	99.3	99.5	99.3	99.7	99.4	100.0	56.9
Wogaman	1100	1034*	988*	971*	967*	963*	916*	725*	100.0	100.0	99.8	100.0	100.0	100.0	99.7	66.5
Orville Wright	750	758	963	929	915	870	781	499	0.0	0.8	6.7	8.1	8.2	6.9	8.3	61.7
Gorman	102	108	101	85	85	86	112*	93	15.6	17.6	11.9	11.8	10.6	14.0	14.3	9.7
Kennedy**	144	181	153	—	—	—	—	—	13.8	11.0	15.7	—	—	—	—	—
Home Teaching	—	—	—	—	—	—	24	43	—	—	—	—	—	—	37.5	53.5
Belmont H.S.	1768	2003	2039	2056	2020	2094	2256	1829	0.0	0.5	2.7	5.2	5.3	6.8	7.6	29.1
Dunbar	1180	1471	1369	1357	1012	990	1283	1408	92.7	99.4	100.0	100.0	99.8	99.8	99.7	72.4
Fairview H.S.	1252	1396	1426	1426	1421	1365	1471	1028	0.9	9.3	19.1	24.1	35.0	43.2	58.3	55.7
Kiser	740	744	731	773	739	688	880	783	2.7	5.4	6.4	9.8	16.1	13.5	24.4	30.3
Meadowdale H.S.	1154	1750	1828	1866	1986	2145	2033	1653	0.0	1.4	5.2	10.6	22.7	33.7	40.6	35.6
Roosevelt	1850	1703	1691	1539	1393	1148	—	—	94.5	99.8	99.9	100.0	100.0	100.0	—	—
Roth	1120	1291	1191	1183	1068	1071	1204	1321	53.5	94.8	96.5	95.8	94.3	98.8	99.4	69.4
Stivers-Patterson																
Patterson Bldg.	1020	1659	1764	1737	1236	1297	1371	1453	1.8	22.2	31.0	32.9	36.9	40.8	48.3	56.7
Stivers Bldg.	1150	1074	1247	1216	1217	1184	1268	1093	2.6	3.9	12.3	14.0	29.7	44.2	60.6	60.9
Colonel White	1668	1741	1727	1501	1449	1245	1330	1534	1.1	28.9	45.9	54.6	60.0	60.7	65.2	65.5
Wilbur Wright	1334	1332	1350	1397	1571	1593	1590	1558	3.3	4.2	5.5	9.2	12.2	12.0	14.9	38.1
Totals (inc. Pre-K)	57,007	58,287*	55,041*	52,162*	49,028*	47,031*	45,181*	41,177*	31.1	39.3	42.7	44.6	46.3	47.5	48.9	52.7
Totals (exc. Pre-K)				50,798	47,683	45,733	44,165	40,257				43.6	45.4	46.5	48.3	52.0

* Includes Pre-School in building

** Figures listed for Patterson/Kennedy include both Patterson and Kennedy for school years 1972-73 through 1976-77

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-539

DAYTON BOARD OF EDUCATION, et al.,

Petitioners,

v.

MARK BRINKMAN, et al.,

Respondents.

BRIEF OF AMICUS CURIAE OHIO STATE BOARD OF EDUCATION AND STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

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I. INTEREST OF AMICUS CURIAE

On December 24, 1975, a motion was filed in the District Court by the Petitioner Dayton Board of Education ("Dayton Board") to require the state defendants[1] to pay a por-

[1] Both the Amicus Curiae, the Ohio State Board of Education and the Ohio State Superintendent of Public Instruction, and the other state defendants, the Governor of Ohio and the Ohio Attorney General, have been named defendants in this case since it was filed. However the District Court severed the issue of the state defendant's liability from the issue of whether the acts of the Petitioner Dayton Board created segregated educational facilities in violation of the Equal Protection Clause of the Fourteenth Amendment. (R. 4-5; February 7, 1973 Findings of Fact and Memorandum Opinion of Law, p. 1.)

tion of the costs incurred in implementing the desegregation plan. Aside from the serious Eleventh Amendment issues presented by such a motion, the Amicus Curiae have an interest in the instant appeal because they are being asked to pay several million dollars in implementing the remedial plan ordered by the District Court.

In a supplemental memorandum filed in the District Court March 4, 1976, the Petitioner itemized the costs it sought from the Amicus Curiae State Board of Education. These costs totaled $7,831,080.00.[2] The Petitioner Dayton Board has represented that it is unable to fund these costs from its budget. The Dayton Board has apparently rejected the possibility of asking the voters to approve a tax increase for the purpose of raising funds for desegregation; the likelihood of passage of such a tax levy is small.

The Amicus Curiae are party defendants to similar desegregation suits pending in District Courts in Cleveland (where desegregation plans have been submitted to the court after trial), Youngstown, Columbus, and Cincinnati, Ohio. The state defendants in each of these cases have been or may be asked to pay a portion of the costs incurred in implementing any plans ordered by the courts. Since the state defendants have no control over the appropriation of monies, payment from available funds of the many millions of dollars involved in plans in which the remedy ordered exceeds the nature of the violation would effectively destroy the Ohio statutory formulas of school financing. The primary casualty of these enormous monetary demands would be the Ohio School Foundation Program, the principal means of financing the operation of Ohio's public schools. The program is based upon statutory formulas

[2] "Supplemental Memorandum of Defendant Dayton Board of Education Relating to Motion to Pay Portion of Cost." These costs included such items as increased transportation costs.

enacted by the Ohio General Assembly to distribute to all school districts funds for the operation of Ohio's public schools. Ohio Rev. Code Chapter 3317. Ohio's statutory system of public school finance is similar to the Texas system upheld in *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973). Indeed, *Rodriguez* recognized that the Texas school financing system had a "counterpart in virtually every other state," 411 U.S. at 17. *See also* 411 at 56 n.111.

These statutory formulas do not give the Amicus Curiae any discretion to allocate funds as the Amicus Curiae wish. For example, for the school year 1975-1976, the Ohio General Assembly appropriated $962,254,763.00 for the Ohio School Foundation Program. This entire amout was distributed to various school districts under the formulas in the above-cited statutes.[3] The state defendants are without discretion over any money to pay for "desegregation costs."

An order that the state defendants share in the cost of implementing a desegregation plan would require them to violate both the School Foundation Program's statutory formulas and the terms of appropriation bills of the Ohio General Assembly, which specify the purposes for which appropriated money may be used. Even if the state defendants used money properly allocated under these formulas to other school districts, in order to fund the Dayton desegregation plan, the other school districts would be receiving far less money than was appropriated for them. The other school districts would then be deprived of necessary operating funds.

[3] Page 4 of Exhibit A to Supplemental Memorandum of State Defendants, in Opposition to Motion of Dayton Board to Require State to Pay Portion of Costs, filed June 4, 1976 in the District Court.

In order to maintain the district-wide fixed racial balance remedy ordered by the District Court in this action, much money is required to transport students through the Dayton City School District. If the Sixth Circuit's order of such an expensive plan in Dayton is upheld, the Amicus Curiae could be asked to pay for any similar plans in other Ohio cities.

The gravity of this problem for the state defendants is that the law requires implementation of these costly remedial orders while an appeal is taken from the trial court's judgment. *See Pasadena City Board of Education* v. *Spangler,* 49 L.Ed. 2d 599, 610 (1976). Many millions of dollars may be spent from the public coffers by defendants in desegregation cases in implementing plans later modified or eliminated on appeal. This Court should give the lower courts some affirmative guidelines for granting stays of remedial orders that involve as much expense and disruption of a school district's operations as does the order in the instant action.

In addition, this Court's decision in this case is important to the Amicus Curiae because the District Court has yet to consider the issues on the merits as to the state defendants.[4] In the first appeal to the Sixth Circuit, the Court of Appeals ordered that the state defendants should not be dismissed from this action, stating in part:

> "The District Court is directed to keep the State defendants as parties to this action . . . . Since an Ohio Attorney General's opinion dated July 9, 1956, the State Department of Education has known that it has an affirmative duty under both Ohio and federal law to take all actions necessary, including, but not limited to, the withholding of state and federal funds, to prevent and eliminate racial segregation in

[4] *See* footnote 1, *supra.*

> the public schools." *Brinkman* v. *Gilligan,* 503 F. 2d 684, 704 (6th Cir. 1974).

If the Sixth Circuit's requirement of racial balance in every school is upheld, the Amicus Curiae would be faced with the claim that every urban school in Ohio must have a similar black-white student ratio.

II. ARGUMENT

THE IMPOSITION OF A SCHOOL DISTRICT-WIDE RACIAL BALANCE REMEDY EXCEEDED THE REMEDIAL POWERS OF A FEDERAL COURT BY IMPOSING THE REQUIREMENT THAT EACH AND EVERY SCHOOL WITHIN THE SYSTEM MUST HAVE A BLACK-WHITE PUPIL RATIO EQUAL TO THAT OF THE DISTRICT AS A WHOLE, PLUS OR MINUS 15%.

This brief is directed to the first and second questions presented in the Petition for a Writ of Certiorari. Those two questions are:

1. Does the imposition of a district-wide recial balance remedy exceed the remedial and equitable powers of a federal court and does such imposition violate 28 U.S.C. § 1712, where, although isolated segregative practices have been found to exist, it has been affirmatively determined that the Board of Education has at no time maintained a dual system?

2. Is a judicial decree valid which requires a fixed racial balance for each and every school in the system?

Although isolated instances of practices having a segregative effect were shown, the unreversed finding of the District Court is that the Petitioner Dayton Board never maintained a dual system of education. Yet the United States Court of Appeals for the Sixth Circuit has mandated a desegregation plan requiring racial balance "in as many of the remaining racially identifiable schools in the Dayton System as feasible." *Brinkman* v. *Gilligan*, 518 F. 2d 853, 857 (6th Cir. 1975). Following this direction of the Sixth Circuit, the District Court on December 29, 1975 decreed that the petitioner Dayton Board could adopt any plan provided that each school in the Dayton System was "desegregated." "Desegregated" was defined as requiring each school in the system (not including grades 11 and 12 for the academic years 1976-1978) to have a pupil population that reflected, within plus or minus 15%, the racial composition of the district as a whole. The Sixth Circuit approved this plan, *Brinkman* v. *Gilligan*, 539 F. 2d 1084, 1086 (6th Cir. 1976).

The District Court's December 29, 1975 order did not itself contain a plan or approve a specific plan that encompassed the 15% requirement. Rather, the District Court left the parties to devise a plan so long as the ultimate end, the fixed racial balance ratio in every school, was maintained.

A. The Scope Of The Remedy Ordered By The Federal Courts May Not Exceed The Nature Of The Violation.

With respect to the remedies to be ordered by the federal courts in desegregation cases, it is well established that: "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-*

Mecklenburg Board of Education, 402 U.S. 1, 16 (1971).[5] This principle was reaffirmed in *Milliken* v. *Bradley*, 418 U.S. 717, 738, 744 (1974). *See also* the opinion of Mr. Justice Powell, concurring in the per curiam order of this Court vacating and remanding the judgment in *Austin Independent School District* v. *United States*, No. 76-200, 45 U.S.L.W. 3413: "I merely emphasis the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the effect of the Constitutional violation."

In the instant case this Court is not faced with a dual school system. The District Court found that the attendance zones, school site selection and construction actions, and the freedom of enrollment system of the Petitioner Dayton Board were not segregative in either their purpose or their effects. February 7, 1973 Findings of Fact and Memorandum Opinion of Law, pp. 5-8 and 9-10. The District Court's specific holding is rather that the existance of racially imbalanced schools, optional attendance zones, and 1972 rescission by the Dayton Board of resolutions which would have promoted integration were cumulatively in violation of the Equal Protection Clause.

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[5] This principle of the remedy being limited by the scope of the violation is especially important in light of the absence on the record before this Court of evidence of a purpose or intent to segregate students on the basis of race. *See Keyes* v. *School District No. 1*, 413 U.S. 189, 208 (1973) (the distinguishing factor between *de jure* segregation and *de facto* segregation is purpose or intent to segregate); *Washington* v. *Davis*, 426 U.S. 229, No. 74-1492, 44 U.S.L.W. 4789, 4792 (1976) (proof of a racially discriminatory purpose is essential to an equal protection violation, and the fact that "there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause."); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, No. 75-616, 45 U.S.L.W. 4073, 4077 (1977) (disproportionate impact is not sufficient; evidence of "racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

The District Court recognized that the majority of optional zones had no racial significance at the time of their creation,[6] were scattered throughout the system (R. 1629), and were located so as to be equal distances from the two schools which they served (R. 1606). Standards of access, safety, school capacity, convenience and prior patterns of attendance were the criterial governing the establishment of optional zones (R. 1878). The racial imbalance existing in the schools within the Dayton School District was a result of the fact that the student populations were racially imbalanced "consistent with the black-white population and geographical distribution" as shown by census figures.[7]

In the absence of a finding that the Petitioner Dayton Board was responsible for this black-white population and geographical distribution, the remedy requiring a balancing of the races in Dayton's schools exceeded the scope of the single cumulative violation made out by the Respondents.

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[6] Finding 11, February 7, 1973 Findings of Fact and Memorandum Opinion of Law, p. 8.

[7] Finding 4, February 7, 1973 Findings of Fact and Memorandum Opinion of Law, p. 5.

B. The Requirement That The Schools In The Dayton School System Each Have A Student Population Consistant With The Black-White Ratio Of The District As A Whole Is Improper.

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22 *et seq.* (1971) dealt with the problem of racial balances or racial quotas. This Court made plain that even in the context of dismantling dual school systems, 402 U.S. at 22, the requirement to desegregate schools "does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S. at 24. *Swann* held that there was no constitutional right to "any particular degree of racial balance or mixing," 402 U.S. at 24. *See also North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971).

More recently this Court declared in *Milliken* v. *Bradley*, 418 U.S. 717, 740-741 (1974) "that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each "school, grade or classroom." Milliken then cautioned that "the use of significant racial imbalance in schools within an autonomous schaal district as a signal which operates simply to shift the burden of proof, is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy." 418 U.S. at 741 n.19. In the instant case the District Court did find racial imbalance in the schools within the Dayton City School System. However, the District Court expressly found that this racial imbalance was consistent with the black-white population and geographical distribution of that population in the City of Dayton.[8]

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[8] This Court has long recognized that local school boards have no control over the demographics within their school system, or the shifting of populations and residential patterns within a city or metropolitan area. *Pasadena City Board of Education* v. *Spangler*, 49 L. Ed. 2d 599, 608

To say this racial imbalance in pupil attendance in the schools must be remedied by the Dayton Board contravenes this Court's holding in *Milliken* v. *Bradley*.

Since (as shown in Section A above,) the scope of the remedy is limited by the nature of the constitutional violation, and since the Petitioner Dayton Board cannot be responsible for the geographical distribution of the population in the Dayton area which caused the racial imbalance in Dayton's schools, the remedy imposed upon the Dayton School District by the lower federal courts in this case is excessive.

This Court has considered a similar situation in *Pasadena City Board of Education* v. *Spangler*, 49 L. Ed. 2d 599 (1976), which held that the District Court could not require the Pasadena School District to rearrange its attendance zones annually so as to perpetually insure a racial mix in the schools. *Spangler* stated the District Court had improperly contemplated "the 'substantive constitutional right [to a] particular degree of racial balance or mixing' which the Court in *Swann* expressly disapproved." 49 L. Ed. 2d at 607. *Spangler* reaffirmed the principle of *Swann* that mathematical ratios are "no more than a starting point in the process of shaping a remedy," 402 U.S. at 25, reaffirmed in *Pasadena City Board of Education* v. *Spangler*, 49 L. Ed. 2d at 607.

"The plan approved in this case applied in general terms to all Pasadena schools," *Spangler*, 49 L. Ed. 2d at 608. Similarly, the order in the instant case applied the 15% racial balance ratio to all Dayton schools (except that high

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(1976). *See also* the opinion of Mr. Justice Powell concurring in *Austin Independent School District* v. *United States*, No. 76-200, 45 U.S.L.W. 3413 (1976): "the principal cause of racial and ethnic imbalance in urban public schools across the country — North and South — is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities."

school students already enrolled in a specific high school could graduate from that school during school years 1976-1977 and 1977-1978). By ordering that no school in the Dayton School District shall have a black-white student ratio different from that of the district as a whole, the lower courts guaranteed and enforced a right to a particular degree of racial balance and mixing. Such a right was disapproved in *Swann* and *Spangler, supra.*

The Sixth Circuit stated that the District Court's opinion of December 29, 1975 "does appear to create a right that the federal courts have never recognized." *Brinkman* v. *Gilligan*, 539 F.2d 1084, 1087 (6th Cir. 1976). The Sixth Circuit then said that the language of the District Court creating such a right "does not appear in the judgment, which is the instrument this Court review on appeal." 539 F.2d at 1087. Without considering *Swann* or *Spangler* on this point, the Court of Appeals chose to interpret the action of the District Court in creating such a new constitutional right as necessary in order "to eliminate the vestiges of past discrimination," 539 F.2d at 1087.

III. CONCLUSION

The imposition of a fixed, district-wide racial balance elevates the requirement of racial mixing to the level of a constitutional right, in contravention of *Swann*, *Milliken*, and *Spangler, supra*. Since racial imbalance is not a constitutional violation, a remedy imposing such a requirement exceeds the scope of the violation in this action.

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-539

DAYTON BOARD OF EDUCATION, *et al.*,

Petitioners,

—v.—

MARK BRINKMAN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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DAYTON BOARD OF EDUCATION, et al.,

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On Writ of Certiorari to The
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for the Sixth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated solely

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* Letters of consent to the filing of this brief from counsel to the parties will be lodged with the Clerk of the Court.

to defending the guarantees of the Bill of Rights. Central among those guarantees is the right of all persons to equal treatment under the law. No component of that right is more precious than the opportunity of black children to receive an education in school systems that are not intentionally segregated. Because of our concern with such issues, the ACLU has represented plaintiffs in school desegregation litigation throughout the country, seeking to make the promise of racial equality in education a reality across the nation.

The arguments raised by the school board in this case, if accepted, would severely undermine those efforts and would effectively limit the requirements established by this Court in Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973). We are filing this brief in order to suggest why the Court should reject those arguments, and should re-affirm the principles set forth in Keyes.

SUMMARY OF ARGUMENT

I.

The courts below properly held that the plaintiffs had made out a case of de jure segregation within the Dayton school system, entitling them to system-wide relief. Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973). Once a proper finding of intent to segregate was made, the burden shifted to the school authorities to show that those schools which were racially identifiable did not have that character as a result of intentionally segregative actions, and the school authorities did not satisfy that burden. Instead, the school authorities are seeking, in effect, to have this Court overrule Keyes and hold that in a district where segregation is not required by state law, the intent to segregate test of de jure segregation no longer applies. That argument should be rejected, and the principles of Keyes re-affirmed.

II.

The remedial plan adopted and approved below is a sound one, does not involve "racial balance," and insures the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. School Commissioners of Mobile County,

402 U.S. 33, 37 (1971). Fears of future "resegregation" or "white flight" cannot undermine the present obligation of the school authorities to achieve desegregation of the Dayton schools. United States v. Scotland Neck Board of Education, 407 U.S. 484 (1971); Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

A R G U M E N T

I

SINCE THE DAYTON SCHOOL BOARD WAS FOUND TO HAVE PRACTICED INTENTIONAL SEGREGATION WITH RESPECT TO A MEANINGFUL PORTION OF THE SCHOOL SYSTEM, AND DID NOT REBUT THE PRESUMPTION THAT THE ONE-RACE CHARACTER OF 47 OUT OF ITS 68 SCHOOLS WAS LIKEWISE THE RESULT OF INTENTIONALLY SEGREGATIVE ACTIONS, THE INTENT TO SEGREGATE IS DEEMED TO EXIST SYSTEM-WIDE, AND SYSTEM-WIDE RELIEF IS MANDATED.

The Dayton School Board argues that since the District Court's finding of intent to segregate was premised only on the discriminatory establishment of optional attendance zones, the District Court could only require the remedying of the segregation that was shown to have resulted from this action and could not order system-wide desegregation. (Brief for Petitioner, pp. 25-30). The District Court also found, however, that the school board was operating an inordinate number (47 out of 68) of "racially imbalanced," or more accurately, racially identifiable schools, and premised its finding of the existence of de jure segregation on both

of these factors. 1/ In addition to the District Court's findings, the record below also contains evidence of the maintenance of a dual school system in Dayton, both before and after Brown, in violation of Ohio law, see the discussion in Brinkman v. Gilligan, 503 F.2d 684, 688-690 (6th Cir. 1974), and of the school board's segregative practices with respect to staff assignment, site selection and school construction. Id. at 697-703. Although the Sixth Circuit noted that the plaintiffs had "raised serious questions with respect to whether the District Judge's failure to include these four school practices within the constitutional violation was supported by substantial

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1/ Although the District Court and the Sixth Circuit, when the case was first before it, did not use the phrase, "de jure," the Sixth Circuit specifically noted subsequently that the finding of the District Court was that, "the Dayton school system has been and is guilty of de jure segregation practices." Brinkman v. Gilligan, 518 F.2d 853, 854 (6th Cir. 1975). The District Court also found that the school board was guilty of de jure segregation when it rescinded prior resolutions that were designed to eliminate segregation, but the Sixth Circuit found it unnecessary to consider this point. Brinkman v. Gilligan, 503 F.2d 684, 697 (6th Cir. 1974).

evidence," it quite correctly concluded that it was unnecessary for it to pass on that question, Id. at 703, since it found that the District Court's conclusion - based on the discriminatory use of the optional attendance zones and the large number of racially identifiable schools - that the board was guilty of practicing de jure segregation was "amply supported by the evidence." Id. at 693.

The holding of the Sixth Circuit that the plaintiffs had made out a case of de jure segregation, entitling them to system-wide relief, was mandated by this Court's decision in Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189 (1973). In Keyes this Court held that in a school district where segregation had not been required by state law, the existence of de jure segregation could be established only by a showing of intent to segregate: "We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation...is purpose or intent to segregate." Id. at 208 (emphasis in original). See also the discussion in Washington v. Davis, 426 U.S. 229, 240 (1976). In Keyes it was also argued, as it is in the present case, that the plaintiffs had to show the existence of system-wide intent to segregate in order to be entitled to system-wide relief. This Court specifically rejected that contention, noting that, "We have never suggested that plaintiffs in school desegregation cases must bear the burden

of proving the elements of de jure segregation as to each and every school or each and every student within the school system." Id. at 200. What the plaintiffs are required to prove in a case challenging school segregation, as in any other case challenging racial discrimination, see Washington v. Davis, supra, Village of Arlington Heights v. Metropolitan Development Corp., ___ U.S. ___, 45 U.S.L.W. 4073 (Jan. 11, 1977), Casteneda v. Partida, ___ U.S. ___, 45 U.S.L.W. 4302 (March 23, 1977), is simply the existence of intent to discriminate.

The substantive constitutional right of black children is the right not to be compelled by state action to attend a segregated school system. See the discussion in Keyes, supra, at 225 (opinion of Powell, J.). Since this is so, where a school system is found guilty of practicing de jure segregation, whether in conformity to the requirements of state law or by a showing of intent to segregate, the school system must be desegregated by a plan that achieves the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. School Commissioners of Mobile County, 402 U.S. 33, 37 (1971).

In school districts where segregation was formerly required by law, and where "vestiges of state-imposed segregation" remain, system-wide relief is required, and no effort is made to "sort out" the

segregation that can be directly traced to state laws requiring segregated schools and that which might be traced to other causes. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

A system-wide remedy may also be imposed upon school districts which have become segregated not by state law but by intentionally discriminatory practices. Under Keyes, proof of "intentionally segregative school board actions in a meaningful portion of the school system creates a presumption that other segregated schooling within the system is not adventitious." 413 U.S. at 208. The school board can overcome this "presumption" by "proving that the other segregated schools within the system are not also the result of intentionally segregative actions." Id. Only when this presumption is rebutted, however, may the desegregation decree be limited to those schools shown to have been intentionally segregated.

In the present case, once the finding of intent to segregate was made, the burden shifted to Dayton to show how many of the 47 racially identifiable schools did not have that character as a "result of intentionally segregative actions." Id. Dayton, however, made no effort whatsoever to satisfy its burden. Although the District Court specifically delayed its supplemental order on remedy, pending this Court's decision in Keyes, the school board never moved the District Court to allow it to introduce

proof showing that the schools other than those that were segregated as a result of its discriminatory use of optional zones were not also "the result of intentionally segregative actions." Id. Quite probably, the school board did not do so because it knew that it could not show that "segregative intent was not among the factors that motivated its actions." Id. at 210. Instead of attempting to discharge the burden clearly placed upon it by Keyes, the school board has insisted throughout this litigation that the plaintiffs had the burden of establishing not only segregatory intent generally, but also segregatory intent with respect to the drawing of attendance zones, site selection, school construction and the like, that produced a condition of segregation in specific schools on a system-wide basis, in order to be entitled to system-wide relief.

As it turns out, the District Court correctly forecast this Court's decision in Keyes, and specifically referred to Keyes in ordering what it considered to be adequate system-wide relief. It must be emphasized that the District Court found not only intent to segregate with respect to the use of optional attendance zones - "intentionally segregative school board actions in a meaningful portion of the school system"[2/] (Id. at 208) - but

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2/ At the time of the litigation, there were seven optional elementary zones and four

(footnote continued on the next page)

also found a high degree of racial isolation and a large number of racially identifiable schools. 503 F.2d at 693-695. Under Keyes, the burden shifted to the school board to show that the racially identifiable character of these schools was not also "the result of intentionally segregative actions," 413 U.S. at 208, but the school board did not even try to sustain that burden. When the case came before the Sixth Circuit, the only question that it had to decide was whether the District Court's findings relating to segregative intent were "clearly erroneous," and it held that they were not. 503 F.2d at 693. Although the plaintiffs buttressed the District Court's findings of segregatory intent by showing the continuing effects of the prior maintenance of a dual system and by showing segregative staff assignment, site selection and school construction, these matters were unnecessary in light of Keyes, and the Sixth Circuit quite properly refused to consider this question. Id. at 703. Since the District Court found segregatory intent in the use of optional attendance zones, it was compelled to reach the conclusion, as it did, that the Dayton

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optional high school zones, in a system that had only 68 total schools and 11 high schools. The high school optional zones contributed most significantly to increased racial segregation. 503 F.2d at 694-696.

school board was guilty of practicing de jure segregation. Since the school board did not attempt to show that the racially identifiable character of its 47 one-race schools was not the result of "intentionally segregative actions," 413 U.S. at 208, there could be no question but that system-wide relief was mandated, as the Sixth Circuit ordered. And since the school board did not seek certiorari to this Court from the Sixth Circuit's decision, the finding of system-wide de jure segregation is now the "law of the case."

The school board is now, in effect, asking this Court to overrule Keyes and to hold that in a school district where segregation is not required by state law,3/ the intent to segregate test of de jure segregation no longer applies, and that black children do not have a constitutional right to attend school in a system that is not segregated. That position must be rejected. The Keyes principles relating to the burden of proof as to system-wide intent to segregate are as sound today as when this Court described them a scant four years ago. As this Court stated in

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3/ This is giving Dayton the benefit of the doubt, since it was operating a dual system, in violation of Ohio law, both before and after Brown. See the discussion, 503 F.2d at 688-690.

Keyes:

> "Where school authorities have been found to have practiced purposeful segregation in part of a school system, they may be expected to oppose system-wide desegregation, as did the respondents in this case, on the ground that their purposefully segregative actions were isolated and individual events, thus leaving the plaintiffs with the burden of proving otherwise. But at that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only 'isolated and individual' unlawfully segregated actions. In that circumstance, it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent."
> 413 U.S. at 209.

The District Court and the Sixth Circuit correctly applied the standards of proof for system-wide de jure segregation established by this Court in Keyes, and if Keyes is fully to be honored and enforced, their decision should be affirmed.

II

THE DESEGREGATION PLAN ADOPTED BY THE DISTRICT COURT AND APPROVED BY THE SIXTH CIRCUIT IS FULLY CONSISTENT WITH, AND IN THE CIRCUMSTANCES OF THIS CASE MANDATED BY, THE APPLICABLE DECISIONS OF THIS COURT.

The essential objection of the Dayton school board to the desegregation plan adopted by the District Court, approved by the Sixth Circuit, and implemented peaceably this past fall, is that it achieves "too much" desegregation by not allowing the board to continue to operate any of its previously 47 one-race schools as one-race schools. The school board confuses - seemingly deliberately - "racial balance" with the elimination of one-race schools so as to achieve the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. School Commissioners of Mobile County, 402 U.S. 33, 37 (1971). "Racial balance," as this Court stated in Swann, means that "every school must always reflect the racial composition of the school system as a whole." 402 U.S. at 24. If the desegregation plan for Dayton had required "racial balance," this would mean that every school would be required to be 52% white and 48% black, which clearly is not so.

Rather, the desegregation plan adopted for Dayton follows Davis by

attempting to achieve the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation," 402 U.S. at 37, and follows the directive of this Court in Swann mandating the elimination of one-race schools. 402 U.S. at 26. The plan employes a flexible minimum-maximum ratio of between 33% and 63% black, designed to insure that no school shall have so many blacks in relation to the system-wide black population so as to be perceived of as a racially identifiable black school or so few blacks so as to be perceived of as a racially identifiable white school.

The school board argues that the Sixth Circuit has "erroneously equated desegregation with the elimination of any predominantly white or predominantly black schools." (Pet. Cert., p. 16). But it is precisely the elimination of predominantly white and predominantly black schools that Swann mandates, and the essential objective of a desegregation plan must be to establish a school system in which there are no "black schools" or "white schools," but just schools, attended by children of both races. Green v. County School Board of New Kent County, 391 U.S. 430, 432 (1968). Moreover, as the Sixth Circuit emphasized, there are no practical obstacles to the elimination of all one-race schools in Dayton by the use of cross-busing (App. Pet. Cert., p. 121a), and this being so, "the greatest possible degree of actual desegregation, taking

into account the practicalities of the situation," 402 U.S. at 37, requires that the one-race schools be eliminated. Dayton simply has no right to retain any one-race schools, and the District Court, like all of the other courts that have adopted plans involving the use of flexible minimum-maximum racial ratios, see e.g., Keyes v. School District No. 1, Denver, 521 F.2d 465 (10th Cir. 1975), cert. denied, 423 U.S. 1066 (1976), was acting not only within its discretion, but in compliance with the desegregation standards contained in the applicable decisions of this Court.

Finally, Dayton argues that "forced transportation" will produce "white flight" and ultimately lead to "resegregation of the school system." (Brief for Petitioners, pp. 35-37). One would have thought that the "white flight" argument would have been laid to rest by this Court's reminder that the fear of "white flight" cannot be accepted as a reason "for achieving anything less than the complete uprooting of the dual school system," United States v. Scotland Neck Board of Education, 407 U.S. 484, 491 (1972); see also, Cooper v. Aaron, 358 U.S. 1, 16 (1958). The duty of the school board is to achieve a unitary system now, and if "white flight" results subsequently, and alters the racial composition of the schools under the desegregation plan, this is something over which the school board and the courts have no control. Pasadena

City Board of Education v. Spangler, 427 U.S. 424 (1976). So long as there are black children and white children living in Dayton, they are entitled to attend school in a desegregated school system. A present condition of segregation cannot be tolerated on the ground that it is necessary to prevent segregation in the future. It is the present condition of segregation that offends the Constitution, and it is that condition that must be eliminated.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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